

**EXHIBIT C-4**

**Fifth Amended Cross-Complaint**

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Gary Smolker and Alice Smolker

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

TIG INSURANCE COMPANY, a California  
Corporation,  
Plaintiff,

vs.

GARY SMOLKER, an individual, and ALICE  
SMOLKER, an individual, and DOES 1-10,  
inclusive,  
Defendants.

GARY SMOLKER and ALICE SMOLKER,  
Cross-complainants,  
vs.

HOME SAVING TERMITE CONTROL,  
INC.; W.F. MORRIS; RIKK THOMPSON;  
W.R. GRACE & CO.; GRACE DAVISON;  
COREGIS GROUP, INC.; COREGIS  
INSURANCE COMPANY; CALIFORNIA  
INSURANCE COMPANY; TRUCK  
INSURANCE EXCHANGE; TRUCK  
UNDERWRITERS ASSOCIATION;

Case No. BC 173952

(Honorable Dzintra Janavs, Judge)  
(Department 15)

**FIFTH AMENDED CROSS-COMPLAINT  
FOR EQUITABLE RELIEF AND  
DAMAGES FOR**

1. Breach of Contract,
2. Bad Faith Breach of Duty of Good Faith  
and Fair Dealing,
3. Strict Liability,
4. Negligence,
5. Nuisance and maintenance of nuisance,
6. Abatement of Nuisance,
7. Trespass,
8. Assault and Battery,
9. Wrongful eviction and waste,
10. Contribution and imposition of  
lien/foreclosure,
11. Willful Misconduct;
12. Breach of Fiduciary Duty,
13. Fraud,
14. Misuse of Confidential Information and  
Wrongful Interference with Relationships,
15. Intentional interference with existing  
contractual and advantageous economic  
relationship through deceit, and

FARMERS GROUP, INC.; FARMERS  
INSURANCE GROUP OF COMPANIES;  
PACIFIC VILLAS HOMEOWNERS'  
ASSOCIATION; TIG INSURANCE  
COMPANY; RELIANCE INSURANCE  
COMPANY; FRONTIER PACIFIC  
INSURANCE COMPANY; JAMES W.  
HOLLAND; JULIE A HOLLAND; LANCE J.  
ROBBINS; JOSEPH A. BAILEY, II;  
ANGELA JORDAN VERDUN; GERALD W.  
IVORY; MATTHEW JOHN FREDERICKS;  
VIRGINIA A CIPRIANO; ALLSTATE  
INSURANCE COMPANY; STATE FARM  
FIRE AND CASUALTY COMPANY;  
INTERINSURANCE EXCHANGE OF THE  
AUTOMOBILE CLUB, TIG INSURANCE  
COMPANY OF TEXAS, NATIONWIDE  
INSURANCE COMPANY, and ROES 1-200,  
inclusive,

Cross-defendants.

16. Intentional interference with prospective  
advantageous economic relationship.

Come now cross-complainants, Gary Smolker and Alice Smolker, and file this fifth amended cross-complaint under protest in compliance with restrictions set forth in court orders made on July 23, & 28 and August 2, 1999, by Honorable Dzintra Janavs, Judge Presiding, which the Smolkers contend are an unconstitutional abridgment of their first and fourteenth amendment rights, an abridgment of their right of freedom of speech, an abridgment of their right to petition the government for redress of grievances, an abridgment of due process of law and a denial to the Smolkers of equal protection of the laws; also, the court had no jurisdiction over this case when it made these orders. Gary Smolker and Alice Smolker allege on information and belief, as follows:

#### PRELIMINARY FACTS REGARDING MEDICAL PAY CLAIMS

1. From January 1, 1996 and through on or about December 1997, cross-defendant Carol Kay ("KAY") owned an estate in real property commonly known as 15 63rd Ave., Playa del Rey, CA., and resided in her condominium thereat with her husband Samuel Eskenazi ("ESKENAZI"). In or about 1996, cross-defendant KAY and her husband ESKENAZI purchased medical

1 payments coverage for the benefit of others (a) injured on their residence premises and any  
2 premises used by KAY or ESKENAZI in connection with their private residence, and also  
3 purchased medical payment coverage for persons (b) injured off these premises if the bodily injury  
4 (i) arose out of a condition of the insured premises or immediately adjoining ways, or (ii) was  
5 caused by the activities of KAY or ESKENAZI. KAY and ESKENAZI purchased this coverage  
6 for the benefit of others from cross-defendant ALLSTATE INSURANCE COMPANY  
7 ("ALLSTATE"), a business entity conducting business in California.

8 2. KAY'S estate in such real property was a condominium consisting of a separate  
9 interest in a residential building on such real property, known as Unit #6, together with an  
10 undivided one sixth interest in common in other portions of the same property known as the  
11 common areas. The individual separate units in the condominium and the common area are as  
12 shown and defined on the condominium plan recorded on 3-3-77 as Instrument No. 77-219328 in  
13 the official records in the office of the County Recorder of Los Angeles County, California  
14 (CONDOMINIUM PLAN).

15 3. The condominium, at 15 63rd St., Playa del Rey, consists of a multi-story multifamily  
16 residential building with a common hallway providing the only ingress and egress to the front door  
17 of each individual condominium unit. The common hallway is also the only means of access to  
18 the U.S. Mail Box at which mail is delivered for all units in the building. The U.S. Mail Box for  
19 this condominium is located in the common hallway.

20 4. In a condominium, a unit is the separate interest, and the common areas are the entire  
21 condominium except the units granted. Thus the owners of a condominium are the grantees of  
22 the units, each grantee owning a separate interest in his unit and an interest, as a tenant in  
23 common, in the common areas.

24 5. In 1996 and/or in early 1997, ALLSTATE issued a condominium owner's liability  
25 policy, ALLSTATE Policy No. 14321027 ("ALLSTATE POLICY"), containing a medical  
26 payments to others provision, denoted Coverage Y Guest Medical Protection in the ALLSTATE  
27 POLICY, to KAY and ESKENAZI, providing the coverage described above in paragraph 1 for  
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1 the benefit of Gary Smolker and Alice Smolker. Gary Smolker and Alice Smolker are intended  
2 beneficiaries of the ALLSTATE POLICY. The medical payment provisions of the ALLSTATE  
3 POLICY (Coverage Y) create a direct obligation of ALLSTATE to Gary Smolker and Alice  
4 Smolker to pay reasonable expenses incurred for necessary medical, surgical, x-ray and dental  
5 services for expenses incurred and services rendered within three years from the date of an  
6 occurrence causing bodily injury to which this policy applies, regardless of KAY'S negligence or  
7 liability or ESKENAZI'S negligence or liability and without regard to the fault of Gary Smolker  
8 or Alice Smolker.

9 6. While the ALLSTATE POLICY was in effect, Gary Smolker and Alice Smolker  
10 incurred medical, x-ray, surgical, dental and hospital expenses for bodily injuries, sustained on the  
11 insured premises, covered by the ALLSTATE POLICY and made a timely claim for medical  
12 benefits owing to Gary Smolker and Alice Smolker under the ALLSTATE POLICY to  
13 ALLSTATE. Gary Smolker's bodily injuries and Alice Smolker's bodily injuries arose out of a  
14 condition on the insured premises, and/or arose out of a condition on immediately adjoining ways,  
15 and were caused by the activities of KAY and/or ESKENAZI.

16 7. In or about December 1997, KAY sold and conveyed KAY's interest in KAY's  
17 condominium (KAY's separate interest in Unit #6 and undivided one sixth interest in the common  
18 areas, as shown and defined on the CONDOMINIUM PLAN) to cross-defendants James Holland  
19 and Julie Holland ('HOLLANDS'), who thereafter rented their condominium out to tenants who  
20 resided therein during 1997 and 1998. The HOLLANDS took up residence in their condominium  
21 in 1999. At the time the HOLLANDS became the owners of KAY's condominium, and  
22 continuously thereafter, the HOLLANDS had in effect medical payments coverage they had  
23 purchased for the benefit of others, issued by cross defendant State Farm Fire and Casualty  
24 Company ("STATE FARM").

25 8. This coverage is provided as Coverage M - MEDICAL PAYMENTS, in STATE  
26 FARM policy No.92-ND-7739-7 ("STATE FARM HOLLAND POLICY"). The STATE FARM  
27 HOLLAND POLICY obligates STATE FARM to pay medical expenses for bodily injury caused  
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1 by an accident on the premises owned or rented by the HOLLANDS, on ways next to premises  
2 the HOLLANDS own or rent, and to pay medical expenses caused because of the HOLLANDS'  
3 operations. The STATE FARM HOLLAND POLICY obligates STATE FARM to make medical  
4 expense payments regardless of fault. Gary Smolker and Alice Smolker are intended beneficiaries  
5 of the STATE FARM HOLLAND POLICY. The medical payment provisions of the STATE  
6 FARM HOLLAND POLICY (Coverage M) create a direct obligation of STATE FARM to Gary  
7 Smolker and Alice Smolker to pay reasonable medical expenses for necessary medical, surgical, x-  
8 ray, dental and hospital services incurred or medically ascertained within one year of the date of  
9 the accident.

10 9. While the STATE FARM HOLLAND POLICY was in effect, Gary Smolker and Alice  
11 Smolker incurred medical, x-ray and hospital expenses for bodily injury (A) caused by accidents  
12 on the premises owned by HOLLAND, (B) caused by accidents on ways next to premises owned  
13 by HOLLAND, and (C) caused by the HOLLANDS' operations, covered by the STATE FARM  
14 HOLLAND POLICY and made a timely claim for medical payment benefits owing under the  
15 STATE FARM HOLLAND POLICY to STATE FARM.

16 10. Cross defendant Lance Robbins ("ROBBINS") owns, and at all times material to this  
17 action owned, an estate in real property commonly known as 15 63rd Ave., Playa del Rey, CA.  
18 At all times material to this action ROBBINS has resided in his condominium thereat with his wife  
19 Rachel Robbins. At all times material to this action ROBBINS had in effect medical payments  
20 coverage ROBBINS had purchased for the benefit of others issued by STATE FARM.  
21 ROBBINS' estate in such property is, and was at all times material to this action, a condominium  
22 consisting of a separate interest in a residential building on such property, known as Unit #5,  
23 together with an undivided one sixth interest in common in other portions of the same property  
24 know as the common areas. Unit #5 and the common area are defined and shown on the  
25 CONDOMINIUM PLAN.

26 11. This coverage is provided as Coverage M - MEDICAL PAYMENTS TO OTHERS,  
27 in STATE FARM Policy Number 71-K2-2599-7 ("STATE FARM ROBBINS POLICY"). The  
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1 STATE FARM ROBBINS POLICY obligates STATE FARM to pay the necessary medical  
2 expenses incurred or medically ascertained within three years from the date of an accident causing  
3 bodily injury to (A) any person on such property, and to (B) any person off the insured location, if  
4 the bodily injury arises out of a condition of the insured location or the ways immediately  
5 adjoining; or is caused by the activities of ROBBINS. Gary Smolker and Alice Smolker are  
6 intended beneficiaries of the STATE FARM ROBBINS POLICY. The medical payment  
7 provisions of the STATE FARM ROBBINS POLICY (Coverage M) create a direct obligation of  
8 STATE FARM to Gary Smolker and Alice Smolker to pay reasonable expenses incurred or  
9 medically ascertained within three years from the date of an accident for necessary medical,  
10 surgical, x-ray and dental services causing bodily injury to which this policy applies, regardless of  
11 ROBBINS' negligence or liability and without regard to the fault of Gary Smolker or Alice  
12 Smolker.

13 12. While the STATE FARM ROBBINS POLICY was in effect, Gary Smolker and Alice  
14 Smolker incurred medical, x-ray, surgical, dental and hospital expenses for bodily injuries,  
15 sustained on the insured location, covered by the STATE FARM ROBBINS POLICY and made a  
16 timely claim to STATE FARM for medical payment benefits owing under the STATE FARM  
17 ROBBINS POLICY. Gary Smolker's bodily injuries and Alice Smolker's bodily injuries arose  
18 out of a condition on the insured premises, and/or immediately adjoining ways, and were caused  
19 by the activities of ROBBINS.

20 13. From on or about January 1, 1996 forward, cross-defendant Matthew John Fredericks  
21 ("FREDERICKS") owned an estate in real property commonly known as 15 63rd Ave., Playa del  
22 Rey, CA., and resided in his condominium thereat with his wife Luchie ("LUCHE"). In or about  
23 1996, cross-defendant FREDERICKS purchased medical payments coverage for the benefit of  
24 others (a) injured on these residential premises and any premises used by FREDERICKS and/or  
25 LUCHE in connection with their private residence, and also purchased medical payment  
26 coverage for persons (b) injured off these premises if the bodily injury (i) arose out of a condition  
27 of the insured premises or immediately adjoining ways, or (ii) was caused by the activities of  
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1 FREDERICKS or LUCHIE. FREDERICKS and LUCHIE purchased this coverage for the  
2 benefit of others from cross-defendant INTERINSURANCE EXCHANGE OF THE  
3 AUTOMOBILE CLUB ("AUTO CLUB"), a business entity conducting business in California.  
4 FREDERICKS' estate in such real property is, and was at all times material to this action, a  
5 condominium consisting of a separate interest in a residential building on such real property,  
6 known as Unit #1, together with an undivided one sixth interest in common in other portions of  
7 the same property known as the common areas. Unit #1 and the common area are shown and  
8 defined on the CONDOMINIUM PLAN.

9 14. In or about early 1996, AUTO CLUB issued a condominium owner's/ homeowner's  
10 liability policy, AUTO CLUB Policy No. PC 6043964 ("AUTO CLUB POLICY"), containing a  
11 medical payments to others provision to FREDERICKS, providing the coverage described above  
12 in paragraph 13 for the benefit of Gary Smolker and Alice Smolker. Gary Smolker and Alice  
13 Smolker are intended beneficiaries of the AUTO CLUB POLICY. The medical payment  
14 provisions of the AUTO CLUB POLICY create a direct obligation of AUTO CLUB to Gary  
15 Smolker and Alice Smolker to pay reasonable expenses incurred or medically ascertained for  
16 necessary medical, surgical, x-ray and dental services for treatment of bodily injury to which this  
17 policy applies, regardless of FREDERICKS' negligence or liability or LUCHIE'S negligence or  
18 liability and without regard to the fault of Gary Smolker or Alice Smolker.

19 15. While the AUTO CLUB POLICY was in effect, Gary Smolker and Alice Smolker  
20 incurred medical, x-ray, surgical, dental and hospital expenses for bodily injuries, sustained on the  
21 insured premises, at the insured location, covered by the AUTO CLUB POLICY and made a  
22 timely claim for medical payment benefits under the AUTO CLUB POLICY. Gary Smolker's  
23 bodily injuries and Alice Smolker's bodily injuries arose out of a condition on the insured  
24 premises, and/or arose out of a condition on immediately adjoining ways, and were caused by the  
25 activities of FREDERICKS and/or LUCHIE.

26 16. On or about June 30, 1996, Gary Smolker and Alice Smolker purchased an  
27 automobile insurance policy (Policy No. TKA 2308 70 78) from cross-defendant TIG  
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1 INSURANCE COMPANY ("TIG AUTO POLICY"), having a policy period of June 30, 1996  
2 through June 30, 1997. The TIG AUTO POLICY provides medical payments coverage which  
3 obligates cross-defendant TIG INSURANCE COMPANY ("TIG") to pay reasonable expenses  
4 for medical services rendered and for medical services determined to be needed because of bodily  
5 injury caused by an accident and sustained by Gary Smolker or Alice Smolker or any Smolker  
6 family member or any other person while occupying the Gary Smolker's or Alice Smolker's  
7 automobile, within three years from the date of the accident. On or about June 30, 1997, and  
8 thereafter, Gary Smolker and Alice Smolker purchased additional automobile insurance coverage  
9 from cross-defendant TIG INSURANCE COMPANY OF TEXAS ("TEXAS") (Policy No. TRA  
10 2308 70 78) under which TEXAS undertook to pay reasonable expenses incurred for necessary  
11 medical services because of bodily injuries caused by an accident and sustained by Gary Smolker  
12 or Alice Smolker or any Smolker family member or any other person while occupying an  
13 automobile owned by Gary Smolker and/or Alice Smolker (coverage provided by this policy is  
14 similar to the medical payment coverage obligations and all other obligations under the TIG  
15 AUTO POLICY) for policy periods June 30, 1997 through December 30, 1997, December 30,  
16 1997 through June 30, 1998, June 30, 1998 through December 30, 1998, and December 30, 1998  
17 through June 30, 1999 ("TEXAS AUTO POLICY"). Gary Smolker and Alice Smolker also  
18 purchased automobile insurance containing medical payments coverage which obligated cross-  
19 defendant NATIONWIDE INSURANCE COMPANY ("NATIONWIDE") (Policy No.  
20 23087078) to pay for reasonable expenses incurred for necessary medical services because of  
21 bodily injuries sustained by Gary Smolker or Alice Smolker or any Smolker family member or any  
22 other person while occupying an automobile owned by Gary Smolker and/or Alice Smolker  
23 (coverage provided by this policy is similar to the medical payment obligations and other  
24 additional obligations specified in the TIG AUTO POLICY) ("NATIONWIDE AUTO  
25 POLICY"). The NATIONWIDE AUTO POLICY has a policy period of June 30, 1998 through  
26 December 30, 1998.

1           17. While the TIG AUTO POLICY, the TEXAS AUTO POLICY, and the  
2           NATIONWIDE AUTO POLICY were in full force and effect, Gary Smolker, Alice Smolker,  
3           Leah Smolker, and Judi Smolker incurred expenses for necessary medical expenses because of  
4           bodily injury caused by accidents while occupying Gary Smolker's and Alice Smolker's insured  
5           automobiles, covered by the TIG AUTO POLICY, the TEXAS AUTO POLICY, and the  
6           NATIONWIDE AUTO POLICY and made timely claims for medical benefits to TIG, TEXAS  
7           and NATIONWIDE.

8           18. In 1996, cross-defendant Pacific Villas Homeowners' Association ("PACIFIC  
9           VILLAS") purchased various poisons, including poisons it is illegal to own use or possess, as  
10          agent of and on behalf KAY, ROBBINS, and FREDERICKS, and had these poisons applied  
11          throughout the condominium complex located at 15 63rd Avenue, Playa del Rey, CA. Gary  
12          Smolker, Alice Smolker, Leah Smolker and Judi Smolker reside, and have resided in this  
13          condominium complex for more than ten years.

14          19. These poisons were applied throughout the condominium complex through holes  
15          drilled in walls, ceilings and the cement slab in the garage in a negligent, reckless and illegal  
16          manner. For example, holes were drilled in the drop ceiling of the common area hallway and  
17          poisonous pesticide dust was injected at a pressure of about 125 pounds per square inch through  
18          these holes into the structural space of approximately eighteen to twenty four inches between the  
19          drop ceiling and the floor above without sealing the various paths from the structural space for the  
20          pesticide dust to be blown back into the atmosphere of the common area hallway. The holes  
21          drilled into the ceiling for the purpose of injecting pesticide dust into the structural space between  
22          the drop ceiling and the floor above were left unsealed for almost two years.

23          20. Pesticide dust injected through holes drilled in the drop ceiling of the common area  
24          hallway went through one hole and out another into the atmosphere of the common area hallway  
25          during the pesticide application process and thereafter settled on the carpet and walls and doors  
26          and mailbox in the common area hallway. At the time of the pesticide application, October 1996,  
27          various patently obviously pathways already existed, in the drop ceiling, such as light fixtures,  
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1 recessed lights, and fans and fan grills, for the pesticide injected through holes drilled in the  
2 common hallway drop ceiling to be blown back into the atmosphere of the common area hallway.  
3 During the pesticide application, and thereafter, pesticide was blown back into the common area  
4 hallway atmosphere through openings in light fixtures and fans, open interfaces between the light  
5 fixtures and fans and the atmosphere of the common area hallway and the structural space above  
6 the drop ceiling, and through the holes drilled in the drop ceiling for the purpose of injecting  
7 pesticide into the structural space above the drop ceiling.

8         21. When KAY, ESKENAZI, ROBBINS, FREDERICKS, LUCHIE, JAMES W.  
9 HOLLAND, JULIE A. HOLLAND, the HOLLANDS' tenants guests and workers opened their  
10 front door, or any other door connected to the common area hallway, they caused pesticide dust  
11 to be blown out of the structural void above the common area drop ceiling into the atmosphere of  
12 the common area hallway; when they walked in the common area hallway they caused pesticide  
13 dust to be blown out of the structural void above the common area hallway drop ceiling into the  
14 atmosphere of the common area hallway and caused dust that had settled on the common area  
15 hallway carpet and walls to be stirred up and recirculated into the common area atmosphere. The  
16 pesticide dust that got into the common area atmosphere and on the common area carpet and  
17 walls got onto Gary Smolker, Alice Smolker, Leah Smolker and Judi Smolker, and thereafter was  
18 tracked and blown into the Smolker's home at the condominium complex. This pesticide  
19 poisoned the Smolkers and caused the Smolkers to suffer bodily injury for which they obtained  
20 medical attention which caused Gary Smolker and Alice Smolker to incur medical expenses  
21 covered by the ALLSTATE POLICY, STATE FARM POLICY, and AUTO CLUB POLICY.

22         22. Gary Smolker and Alice Smolker complained to KAY, ESKENAZI, HOLLANDS,  
23 ROBBINS, and FREDERICKS that Gary and Alice Smolker and their children (Leah Smolker  
24 and Judi Smolker) had been poisoned and made ill and were being continuously poisoned and  
25 made ill by the presence of pesticide in the condominium complex. Gary Smolker and Alice  
26 Smolker complained to and advised KAY, ESKENAZI, HOLLANDS, ROBBINS, and  
27 FREDERICKS of the danger presented by the presence of pesticide in the common area carpet, in  
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1 the atmosphere of the common area hallway, on the walls in the common area hallway, and of the  
2 continuing danger presented by allowing holes to remain in the walls and ceiling of the  
3 condominium complex that allowed pesticide to enter the atmosphere of the common area  
4 hallway and the atmosphere of the Smolkers' home, and of the unreasonable risk of injury  
5 presented by not having the common area carpet cleaned and/or replaced and the common area  
6 hallway walls and ceilings cleaned, and of the unreasonable danger presented by allowing holes  
7 drilled in the common area hallway ceiling to remain unsealed and that opening and closing doors  
8 in the common area hallway and/or walking the common area hallway caused pressure forces  
9 which caused more pesticide to be drawn into the atmosphere of the common area hallway.

10 23. KAY, HOLLANDS, ROBBINS, and FREDERICKS refused to have the holes drilled  
11 in the common area hallway drop ceiling sealed for over a year after the Oct. 1996 pesticide  
12 treatment in the condominium complex occurred, and refused to have the pesticide that  
13 contaminated the common area carpet, walls, ceiling and doors remediated, which created a  
14 dangerous condition that contributed to Gary Smolker, Alice Smolker, Leah Smolker, and Judi  
15 Smolker being poisoned and being made ill and suffering bodily injury. Gary and Alice Smolker  
16 incurred medical expenses caused by such bodily injury, covered by the ALLSTATE POLICY,  
17 STATE FARM HOLLAND POLICY, STATE FARM ROBBINS POLICY, and AUTO CLUB  
18 POLICY.

19 24. After the October 1996 pesticide treatment of the condominium complex, poisonous  
20 substances got into the Smolker's insured automobiles and caused bodily injury to Gary Smolker,  
21 Alice Smolker, Leah Smolker and Judi Smolker, which resulted in Gary Smolker and Alice  
22 Smolker incurring medical expenses covered by the TIG AUTO POLICY, TEXAS AUTO  
23 POLICY, and NATIONWIDE AUTO POLICY.

24  
25 **FIRST CAUSE OF ACTION FOR BREACH OF CONTRACT**  
26 **BY CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
27 **AGAINST CROSS DEFENDANT ALLSTATE**  
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2 25. Cross-complainants Gary Smolker and Alice Smolker ("the SMOLKERS") hereby  
3 refer to and incorporate each and every allegation contained in paragraphs 1 through 6, and  
4 paragraphs 18 through 23 of this fourth amended cross-complaint as though the same were set  
5 out at this point.

6 26. ALLSTATE has been aware of the SMOLKERS injuries and that medical expenses  
7 incurred by the SMOLKERS' were covered by the ALLSTATE POLICY for approximately one  
8 year. In January 1999 the SMOLKERS first discovered the existence of the ALLSTATE  
9 POLICY. On or about February 8, 1999, the SMOLKERS submitted a written claim for payment  
10 of medical expenses covered under the ALLSTATE POLICY, for medical payment benefits  
11 owing to the SMOLKERS. By letter dated Feb. 26, 1999, ALLSTATE acknowledged receipt of  
12 the SMOLKERS' claim. The SMOLKERS sent a follow up letter by fax and mail to ALLSTATE  
13 on March 3, 1999 requesting payment of medical expense benefits covered by the ALLSTATE  
14 POLICY and owing to the SMOLKERS.

15 27. By letter dated March 4, 1999, ALLSTATE set forth ALLSTATE's contentions  
16 regarding the facts underlying the SMOLKERS' claim, ALLSTATE's legal analysis of the facts,  
17 and ALLSTATE informed the SMOLKERS that ALLSTATE declined to pay medical payment  
18 benefits owing to the SMOLKERS. In the March 4, 1999 letter, ALLSTATE misstated the facts  
19 and misapplied the law to the facts underlying the SMOLKERS' claim.

20 28. On March 8, 1999, the SMOLKERS faxed and mailed a reply to ALLSTATE's letter  
21 dated March 4, 1999, in which the SMOLKERS informed ALLSTATE that ALLSTATE'S letter  
22 left out material facts concerning the SMOLKERS' medical payment coverage claim and  
23 mischaracterizes the facts underlying the SMOLKERS' claim. In their March 8, 1999 letter, the  
24 SMOLKERS set forth all pertinent facts underlying their claim and explained why their claim was  
25 covered by the ALLSTATE POLICY.

26 29. ALLSTATE responded to the SMOLKERS' March 8, 1999 letter by letter dated  
27 March 22, 1999. Thereafter, more correspondence ensued between the SMOLKERS and  
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1 ALLSTATE. ALLSTATE continued to refuse to pay any of the medical expenses covered by the  
2 ALLSTATE POLICY. The SMOLKERS wrote and sent further letters to ALLSTATE by fax on  
3 March 29, 1999, April 21, 1999, April 24, 1999, April 29, 1999, and May 14, 1999. ALLSTATE  
4 responded by letters dated April 1, 1999 and April 23, 1999. The failure and refusal of  
5 ALLSTATE to pay any of the SMOLKERS' medical expenses, after request of the SMOLKERS'  
6 request to do so, was a breach of the ALLSTATE POLICY.

7 30. As a direct and proximate result of ALLSTATE's breach of contract the  
8 SMOLKERS have been damaged in a sum to be proved at trial in the amount of medical expenses  
9 already incurred and in the additional amount of future medical treatments ascertained or  
10 unascertained which will be necessary to treat the bodily injury suffered by Gary Smolker, Alice  
11 Smolker, Leah Smolker and Judi Smolker. ALLSTATE has been unjustly enriched by the amount  
12 of medical expenses ALLSTATE should have already paid and will be unjustly enriched in the  
13 future by an additional sum equal to the amount of future medical expenses to be incurred by the  
14 SMOLKERS that ALLSTATE should pay but refuses to pay. The amount of unjust enrichment  
15 will be proved at time of trial.

16 31. The SMOLKERS have suffered emotional damages, and loss of earnings and earning  
17 capacity as a direct and proximate and foreseeable result of ALLSTATE's breach of contract in  
18 an amount to be proved at time of trial.

19 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
20 hereinafter set forth.

21  
22 **SECOND CAUSE OF ACTION FOR BREACH OF**  
23 **DUTY OF GOOD FAITH AND FAIR DEALING BY**  
24 **CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
25 **AGAINST CROSS DEFENDANT ALLSTATE**  
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1           32. Cross-complainants Gary Smolker and Alice Smolker reallege and incorporate herein  
2 by reference each and every allegation contained in paragraphs 25 through 31 of this fifth  
3 amended cross-complaint.

4           33. Implied in the ALLSTATE POLICY are covenants by ALLSTATE that ALLSTATE  
5 would act in good faith and deal fairly, only engage in fair practices in dealing with the  
6 SMOLKERS and would treat the SMOLKERS with decency and humanity and not abuse its  
7 discretionary power and authority when processing the SMOLKERS' claim for medical benefits,  
8 and would do nothing to interfere with the SMOLKERS' rights to receive medical payment  
9 benefits under the ALLSTATE POLICY.

10           34. At all times since receipt of notice of the SMOLKERS' claim for payment of medical  
11 expenses, ALLSTATE has known that the SMOLKERS are entitled to payment of medical  
12 expenses and has wrongfully, deliberately and without just cause refused to pay any of the  
13 SMOLKERS' medical expenses, in breach of ALLSTATE's covenant of good faith. In further  
14 breach of ALLSTATE'S covenant of good faith, ALLSTATE has informed the SMOLKERS that  
15 the SMOLKERS must bring and prosecute a lawsuit to prove the SMOLKERS incurred medical  
16 expenses as a direct result of KAY's and/or ESKENAZI'S activities, if the SMOLKERS intend to  
17 receive any payment for medical expenses from ALLSTATE.

18           35. As a direct and proximate result of ALLSTATE'S bad faith conduct, and breach of  
19 fiduciary duties, the SMOLKERS have suffered compensable losses, including benefits withheld,  
20 loss of earning capacity and earnings, and have suffered embarrassment and humiliation, anxiety  
21 and frustration, and severe mental and emotional distress and discomfort, all to the SMOLKERS  
22 damage in amounts not fully ascertainable but within the jurisdiction of this court in an amount to  
23 be proved at the time of trial.

24           36. Cross-defendant ALLSTATE'S conduct described herein was done willfully with a  
25 conscious disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to,  
26 injure and annoy the SMOLKERS, such as to constitute oppression, fraud and malice under  
27 California Civil Code Section 3294 entitling the SMOLKERS, and each of them, to punitive  
28

1 damages in an amount appropriate to punish and set an example of cross-defendant ALLSTATE  
2 by means of punishment.

3 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
4 hereinafter set forth.

5  
6 **THIRD CAUSE OF ACTION FOR BREACH OF CONTRACT**  
7 **BY CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
8 **AGAINST CROSS DEFENDANT STATE FARM**  
9

10 37. Cross-complainants Gary Smolker and Alice Smolker ("the SMOLKERS") hereby  
11 refer to and incorporate each and every allegation contained in paragraphs 1 through 12, and  
12 paragraphs 18 through 23 of this fifth amended cross-complaint as though the same were set out  
13 at this point.

14 38. STATE FARM has been aware of the SMOLKERS injuries and that medical  
15 expenses incurred by the SMOLKERS' were covered by the STATE FARM HOLLAND  
16 POLICY and by the STATE FARM ROBBINS POLICY since on or about early January 1998.  
17 In January 1999 the SMOLKERS first discovered the existence of the medical pay benefits under  
18 such policies. On or about January 16, 1999, the SMOLKERS submitted a written claim for  
19 payment of medical expenses covered under the STATE FARM HOLLAND POLICY and under  
20 the STATE FARM ROBBINS POLICY, for medical payment benefits owing to the  
21 SMOLKERS. By letters dated Feb. 3 and Feb. 4, 1999, STATE FARM acknowledged receipt of  
22 the SMOLKERS' claim and requested that the SMOLKERS submit medical bills and reports to  
23 support the SMOLKERS' claims for Medical Payments Coverage. The SMOLKERS mailed and  
24 faxed the information requested applicable to medical payments due under the STATE FARM  
25 HOLLAND POLICY and under the STATE FARM ROBBINS POLICY to STATE FARM on  
26 Feb. 10, 1999. Thereafter STATE FARM failed and refused to communicate with the  
27  
28



1 SMOLKERS about the SMOLKERS' medical payments coverage claims in spite of follow up  
2 letters and faxes sent to STATE FARM.

3 39. Finally, by letters dated April 3, 1999 and April 6, 1999, STATE FARM set forth  
4 STATE FARM'S contentions regarding the facts underlying the SMOLKERS' claim, STATE  
5 FARM'S legal analysis of the facts, and STATE FARM informed the SMOLKERS that STATE  
6 FARM declined to pay medical payment benefits owing to the SMOLKERS. In the April 3 and  
7 April 6, 1999 letters, STATE FARM misstated the facts and misapplied the law to the facts  
8 underlying the SMOLKERS' claim.

9 40. By return post, the SMOLKERS faxed and mailed a reply to STATE FARM'S letters  
10 dated April 3 and April 6, 1999, and follow-up replies to further correspondence from STATE  
11 FARM in which the SMOLKERS informed STATE FARM'S that STATE FARM'S letter left  
12 out material facts concerning the SMOLKERS' medical payment coverage claim,  
13 mischaracterizes the facts underlying the SMOLKERS' claim, and applied the wrong law to the  
14 facts underlying the SMOLKERS' claims. In their reply and follow-up letters, the SMOLKERS  
15 set forth all pertinent facts underlying their claim and explained why their claim was covered by  
16 the STATE FARM HOLLAND POLICY and by the STATE FARM ROBBINS POLICY.

17 41. STATE FARM responded to the SMOLKERS' reply and follow-up letters. STATE  
18 FARM continued to refuse to pay any of the medical expenses covered by the STATE FARM  
19 HOLLAND POLICY and continued to refuse to pay any of the medical expenses covered by the  
20 STATE FARM ROBBINS POLICY. STATE FARM'S refusal to pay any of the SMOLKERS'  
21 medical expenses was in breach of the STATE FARM HOLLAND POLICY and in breach of the  
22 STATE FARM ROBBINS POLICY.

23 42. As a direct and proximate result of STATE FARM'S breach of contract the  
24 SMOLKERS have been damaged in a sum to be proved at trial in the amount of medical expense  
25 already incurred and in the additional amount of future medical treatments ascertained or  
26 unascertained which will be necessary to treat the bodily injury suffered by Gary Smolker, Alice  
27 Smolker, Leah Smolker and Judi Smolker. STATE FARM has been unjustly enriched by the  
28

1 amount of medical expenses STATE FARM should have already paid and will be unjustly  
2 enriched in the future by an additional sum equal to the amount of future medical expenses to be  
3 incurred by the SMOLKERS that STATE FARM should pay but refuses to pay. The amount of  
4 unjust enrichment will be proved at time of trial.

5 43. The SMOLKERS have suffered emotional damages, and loss of earnings and earning  
6 capacity as a direct and proximate and foreseeable result of STATE FARM'S breach of contract  
7 in an amount to be proved at time of trial.

8 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
9 hereinafter set forth.

10  
11 **FOURTH CAUSE OF ACTION FOR BREACH OF**  
12 **DUTY OF GOOD FAITH AND FAIR DEALING BY**  
13 **CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
14 **AGAINST CROSS DEFENDANT STATE FARM**  
15

16 44. Cross-complainants Gary Smolker and Alice Smolker reallege and incorporate herein  
17 by reference each and every allegation contained in paragraphs 37 through 43 of this fifth  
18 amended cross-complaint.

19 45. Implied in the STATE FARM HOLLAND POLICY and in the STATE FARM  
20 ROBBINS POLICY are covenants by STATE FARM that STATE FARM would act in good  
21 faith and deal fairly, only engage in fair practices in dealing with the SMOLKERS and would treat  
22 the SMOLKERS with decency and humanity and not abuse its discretionary power and authority  
23 when processing the SMOLKERS' claim for medical benefits, and would do nothing to interfere  
24 with the SMOLKERS' rights to receive medical payment benefits under the STATE FARM  
25 HOLLAND POLICY and would never do anything to interfere with the SMOLKERS rights to  
26 receive medical benefits under the STATE FARM ROBBINS POLICY.

1           46. At all times since receipt of notice of the SMOLKERS' claim for payment of medical  
2 expenses, STATE FARM has known that the SMOLKERS are entitled to payment of medical  
3 expenses and has wrongfully, deliberately and without just cause refused to pay any of the  
4 SMOLKERS' medical expenses, in breach of STATE FARM'S covenant of good faith. In  
5 further breach of STATE FARM'S covenant of good faith, STATE FARM has informed the  
6 SMOLKERS that the SMOLKERS must bring and prosecute a lawsuit to prove the SMOLKERS  
7 incurred medical expenses as a direct result of the HOLLANDS' and/or ROBBINS' activities, if  
8 the SMOLKERS intend to receive any payment for medical expenses from STATE FARM.

9           47. As a direct and proximate result of STATE FARM'S bad faith conduct, and breach of  
10 fiduciary duties, the SMOLKERS have suffered compensable losses, including benefits withheld,  
11 loss of earning capacity and earnings, and have suffered embarrassment and humiliation, anxiety  
12 and frustration, and severe mental and emotional distress and discomfort, all to the SMOLKERS  
13 damage in amounts not fully ascertainable but within the jurisdiction of this court in an amount to  
14 be proved at the time of trial.

15           48. Cross-defendant STATE FARM'S conduct described herein was done willfully with a  
16 conscious disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to,  
17 injure and annoy the SMOLKERS, such as to constitute oppression, fraud and malice under  
18 California Civil Code Section 3294 entitling the SMOLKERS, and each of them, to punitive  
19 damages in an amount appropriate to punish and set an example of cross-defendant STATE  
20 FARM by means of punishment.

21           WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
22 hereinafter set forth.

23  
24                   **FIFTH CAUSE OF ACTION FOR BREACH OF CONTRACT**  
25           **BY CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
26                   **AGAINST CROSS DEFENDANT AUTO CLUB**  
27  
28

1           49. The SMOLKERS hereby refer to and incorporate by reference each and every  
2 allegation contained in paragraphs 3 through 15, and paragraphs 18 through 23 of this fifth  
3 amended complaint as though the same were set out at this point.

4           50. The SMOLKERS submitted a claim for medical payments owing to the SMOLKERS  
5 under the AUTO CLUB POLICY to AUTO CLUB in February 1999. In breach of the AUTO  
6 CLUB POLICY, the AUTO CLUB refused to tell the SMOLKERS whether the AUTO CLUB  
7 would pay the SMOLKERS' claim and the AUTO CLUB failed and refused to pay the  
8 SMOLKERS's claim.

9           51. As a direct and proximate result of AUTO CLUB'S breach of contract the  
10 SMOLKERS have been damaged in a sum to be proved at trial in the amount of medical expenses  
11 already incurred and in the additional amount of future medical treatments ascertained or  
12 unascertained which will be necessary to treat the bodily injury suffered by Gary Smolker, Alice  
13 Smolker, Leah Smolker and Judi Smolker. AUTO CLUB has been unjustly enriched by the  
14 amount of medical expenses AUTO CLUB should have already paid and will be unjustly enriched  
15 in the future by an additional sum equal to the amount of future medical expenses to be incurred  
16 by the SMOLKERS that AUTO CLUB should pay but refuses to pay. The amount of unjust  
17 enrichment will be proved at time of trial.

18           52. The SMOLKERS have suffered emotional damages, and loss of earnings and earning  
19 capacity as a direct and proximate and foreseeable result of AUTO CLUB'S breach of contract in  
20 an amount to be proved at time of trial.

21           WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
22 hereinafter set forth.

23  
24                               **SIXTH CAUSE OF ACTION FOR BREACH OF**  
25                               **DUTY OF GOOD FAITH AND FAIR DEALING BY**  
26                               **CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
27                               **AGAINST CROSS DEFENDANT AUTO CLUB**  
28

1  
2 53. Cross-complainants Gary Smolker and Alice Smolker reallege and incorporate herein  
3 by reference each and every allegation contained in paragraphs 49 through 52 of this fifth  
4 amended cross-complaint.

5 54. Implied in the AUTO CLUB POLICY are covenants by AUTO CLUB that would act  
6 in good faith and deal fairly, only engage in fair practices in dealing with the SMOLKERS and  
7 would treat the SMOLKERS with decency and humanity and not abuse its discretionary power  
8 and authority when processing the SMOLKERS' claim for medical benefits, and would do  
9 nothing to interfere with the SMOLKERS' rights to receive medical payment benefits under the  
10 AUTO CLUB POLICY.

11 55. At all times since receipt of notice of the SMOLKERS' claim for payment of medical  
12 expenses, AUTO CLUB has known that the SMOLKERS are entitled to payment of medical  
13 expenses and has wrongfully, deliberately and without just cause refused to pay any of the  
14 SMOLKERS' medical expenses, in breach of AUTO CLUB'S covenant of good faith.

15 56. As a direct and proximate result of AUTO CLUB'S bad faith conduct, and breach of  
16 fiduciary duties, the SMOLKERS have suffered compensable losses, including benefits withheld,  
17 loss of earning capacity and earnings, and have suffered embarrassment and humiliation, anxiety  
18 and frustration, and severe mental and emotional distress and discomfort, all to the SMOLKERS  
19 damage in amounts not fully ascertainable but within the jurisdiction of this court in an amount to  
20 be proved at the time of trial.

21 57. Cross-defendant AUTO CLUB'S conduct described herein was done willfully with a  
22 conscious disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to,  
23 injure and annoy the SMOLKERS, such as to constitute oppression, fraud and malice under  
24 California Civil Code Section 3294 entitling the SMOLKERS, and each of them, to punitive  
25 damages in an amount appropriate to punish and set an example of cross-defendant AUTO CLUB  
26 by means of punishment.

1           WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
2 hereinafter set forth.

3  
4                   **SEVENTH CAUSE OF ACTION FOR BREACH OF CONTRACT**  
5           **AND BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**  
6           **BY CROSS COMPLAINANTS GARY SMOLKER AND ALICE SMOLKER**  
7           **AGAINST CROSS DEFENDANTS TEXAS AND NATIONWIDE**

8  
9           58. The SMOLKERS incorporate herein by reference each and every allegation contained  
10 in paragraphs 16, 17, and 24 of this fifth amended cross-complaint as though the same were set  
11 out at this point.

12           59. In breach of the TEXAS AUTO POLICY, TEXAS refused to pay medical payment  
13 benefits owing to the SMOLKERS. In breach of the NATIONWIDE AUTO POLICY,  
14 NATIONWIDE refused to pay medical payment benefits owing to the SMOLKERS. TEXAS'  
15 refusal to pay was unreasonable and without just cause, with a conscious disregard of the  
16 SMOLKERS' rights and with intent to vex and annoy the SMOLKERS. NATIONWIDE's  
17 refusal was unreasonable and without just cause., with a conscious disregard of the SMOLKERS  
18 rights and with intent to vex and annoy the SMOLKERS. The SMOLKERS have been injured as  
19 a direct and proximate result of the conduct of TEXAS and NATIONWIDE in an amount to be  
20 proved at trial.

21           WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
22 hereinafter set forth.

23  
24           **ADDITIONAL PRELIMINARY FACTS REGARDING NEGLIGENCE, NUISANCE,**  
25           **TRESPASS, WASTE, PRODUCT LIABILITY AND WILLFUL MISCONDUCT CLAIM:**

1           60. That certain real property commonly known as 15 63rd Ave., Playa del Rey, CA. is,  
2 and at all times material herein was, a condominium project ("CONDOMINIUM COMPLEX")  
3 consisting of common areas and six individual condominium units all as more particularly  
4 described, depicted and shown on the CONDOMINIUM PLAN.

5           61. Cross-defendant Joseph A. Bailey, II ("BAILEY"), now owns, and, has owned a  
6 separate interest in Unit #3 of the CONDOMINIUM COMPLEX together with an undivided one  
7 sixth interest in the common areas for more than ten years. Cross-defendant Virginia A. Cipriano  
8 ("CIPRIANO"), now owns, and, has owned a separate interest in Unit #1 of the  
9 CONDOMINIUM COMPLEX together with an undivided one sixth interest in the common  
10 areas, in common with FREDERICKS, since July 1996. Gary Smolker now owns, and, has  
11 owned a separate interest in Unit #4 in the CONDOMINIUM COMPLEX together with an  
12 undivided one-sixth interest in the common areas for over 20 years. Cross-defendants Gerald W.  
13 Ivory ("IVORY") and Angela Jordan Verdun ("VERDUN"), now own, and, have jointly owned a  
14 separate interest in Unit #2 of the CONDOMINIUM COMPLEX together with an undivided one  
15 sixth interest in the common areas for more than five years.

16           62. At all times material to this action, the owners of individual interests in the  
17 CONDOMINIUM COMPLEX, and each of them, delegated control and management of the  
18 common areas of the CONDOMINIUM COMPLEX to their homeowners association, PACIFIC  
19 VILLAS, which has no ownership interest in the CONDOMINIUM COMPLEX. At all times  
20 material to this action, the owners of the common areas of CONDOMINIUM COMPLEX were  
21 subject to the same nondelegable duties to control and manage their property as are other  
22 property owners.

23           63. The current owners of the common areas of the CONDOMINIUM COMPLEX are  
24 the HOLLANDS, ROBBINS, BAILEY, VERDUN, IVORY, FREDERICKS, CIPRIANO, and  
25 Gary Smolker, who currently are tenants-in-common owners of the common areas of the  
26 CONDOMINIUM COMPLEX.

1           64. The common areas of the CONDOMINIUM COMPLEX have been negligently  
2 maintained controlled managed and operated by ROBBINS, BAILEY, VERDUN, IVORY,  
3 FREDERICKS, and PACIFIC VILLAS, and each of them, since 1994. CIPRIANO has  
4 negligently managed maintained controlled and operated the common areas of the  
5 CONDOMINIUM COMPLEX since July 1996. The HOLLANDS have negligently managed  
6 maintained controlled and operated the common areas of the CONDOMINIUM COMPLEX since  
7 December 1997. The common areas of the CONDOMINIUM COMPLEX were negligently  
8 managed maintained controlled and operated by KAY from 1994 through December 1997.

9           65. As a direct and proximate result of the negligent maintenance, control, management  
10 and operation of the common areas of the CONDOMINIUM COMPLEX by the HOLLANDS,  
11 ROBBINS, BAILEY, VERDUN, IVORY, FREDERICKS, (collectively "CURRENT  
12 OPERATORS") and PACIFIC VILLAS, and each of them, the roof of the CONDOMINIUM  
13 COMPLEX now leaks and has leaked for years causing water damage to the SMOLKERS' home  
14 when it rains; the common areas are now infested with termites and have been infested with  
15 termites for years, eating up the wooden structure of the CONDOMINIUM COMPLEX and  
16 depreciating the value of Gary Smolker's condominium unit therein and necessitating future  
17 repairs of the wooden members of the structure. As a direct and proximate result of the acts and  
18 omissions of cross-defendants, and each of them, there are now hazardous irritating toxic  
19 poisonous substances in the common areas and in the SMOLKERS' home. As a direct and  
20 proximate result of the acts and omissions of cross-defendants, and each of them, poisonous  
21 substances deposited in the structural voids in the common areas of the CONDOMINIUM  
22 COMPLEX by HOME SAVING in 1996 have been "blown" out of the structural voids in the  
23 common areas into the common area hallway and into the SMOLKERS' home; these poisonous  
24 substances have damaged the SMOLKERS' home, the SMOLKERS' personal property, the  
25 SMOLKERS' health, and interfered with the SMOLKERS' comfortable enjoyment of their life  
26 and property; as a direct result of the of the acts and omissions of cross-defendants, and each of  
27 them, these poisonous substances have been and are being deposited on the SMOLKERS, are  
28



1 being inhaled by the SMOLKERS, and being deposited on the SMOLKERS' property. There is  
2 unrepaired water damage in the common areas; an irritating bad odor in the common area hallway  
3 and unsightly open holes cut into the common area hallway ceiling, which interfere with the  
4 SMOLKERS' use and enjoyment of their home; there is unrepaired earthquake damage, wind  
5 damage, termite damage, water damage, dilapidation and poisonous substances in the common  
6 areas which have constituted a known hazardous and dangerous condition in the  
7 CONDOMINIUM COMPLEX for years. The common area has been in a continuous dilapidated  
8 condition since 1994. The common area roof has leaked since 1994. The common areas have  
9 been infested with termites since 1994. The common areas have been contaminated with  
10 poisonous substances owned by CURRENT OPERATORS which have come out from behind the  
11 walls and ceilings of the common area, during 1999, 1998, and 1997, into the atmosphere of the  
12 common area hallway, and into the atmosphere of the SMOLKERS' home.

13 66. As a direct and proximate result of the negligence of cross-defendant HOME  
14 SAVING TERMITE CONTROL, INC. ("HOME SAVING"), cross-defendant W.F. MORRIS  
15 ("MORRIS"), cross-defendant W.R. GRACE & CO. ("GRACE"), cross-defendant GRACE  
16 DAVISON ("GRACE DAVISON"), ROBBINS, BAILEY, VERDUN, IVORY, CIPRIANO,  
17 FREDERICKS, and PACIFIC VILLAS (collectively "INITIAL PROCURING CAUSE  
18 DEFENDANTS"), and each of them, illegal irritating toxic poisonous substances were illegally  
19 applied in the common areas of the CONDOMINIUM COMPLEX at the request and under the  
20 direction of KAY, ROBBINS, BAILEY, VERDUN, IVORY, FREDERICKS, CIPRIANO and  
21 PACIFIC VILLAS (collectively "REQUESTERS"), and each of them, in October 1996 for the  
22 purpose of eradicating termites, in violation of *Food & Agriculture* Sections 12993, and 12995  
23 and in violation of 7 *US Code* Section 136(a). Thereafter, cross-defendants, and each of them,  
24 failed to exercise reasonable care to prevent the SMOLKERS and the SMOLKERS' home and  
25 automobiles from being exposed to the irritating toxic poisonous substances which had been  
26 applied in the common areas of the CONDOMINIUM COMPLEX for the purpose of eradicating  
27 termites.

67. MORRIS is a resident of Los Angeles County, and alter ego of HOME SAVING. HOME SAVING is a California corporation which, now and, at all times material to this action, held itself out as being a licensed bonded and insured general contractor and pest control operator. In October 1996 HOME SAVING was employed by PACIFIC VILLAS, on behalf of REQUESTERS, to eradicate termite infestations in the CONDOMINIUM COMPLEX. While working for REQUESTERS on this project, in October 1996, HOME SAVING created holes in the common areas and in the SMOLKERS' home through which poisonous substances and water could and did enter into the SMOLKERS' home and through which poisonous substances could and did enter the common area hallway. HOME SAVING misapplied pesticides in the common areas of the CONDOMINIUM COMPLEX and in the SMOLKERS' home. During HOME SAVING's application of pesticides, irritating toxic poisonous substances were caused to enter into the common area hallway and into the SMOLKERS' home through holes created by HOME SAVING and through other already existing openings in the walls and ceilings that were plainly visible. As a direct and proximate result of HOME SAVING's misapplication of pesticides in the CONDOMINIUM COMPLEX irritating toxic poisonous substances also entered into the SMOLKERS' automobiles. HOME SAVING applied pesticides in the CONDOMINIUM COMPLEX in such a way that irritating toxic poisonous substances would come into the common area hallway and into the SMOLKERS' home after HOME SAVING was done applying pesticides when there were vibrations in the building, and/or or when doors opening on the common area hallway were opened and closed, when people walked in the common area hallway, when a wind blew against the building, or whenever there were pressure changes or temperature changes which created a pressure differential or temperature differential between the pressure or temperature in the wall and ceiling voids of the common areas and in the SMOLKERS's home which created air movements into the SMOLKERS' home or into the common area hallway.

68. As a direct and proximate result of the acts and omissions of HOLLANDS, ROBBINS, BAILEY, VERDUN, IVORY and FREDERICKS (collectively 'CURRENT RESIDENTS'), and of the acts and omissions of all other cross-defendants, and each of them, it

1 1997, 1998, and 1999, irritating toxic poisonous substances entered into and were deposited on  
2 the SMOLKERS' property and persons, and were involuntarily inhaled by the SMOLKERS.  
3 CURRENT RESIDENTS, and each of them, caused irritating toxic poisonous substances to be  
4 blown into the atmosphere of the common area hallway, on to the walls of the common area  
5 hallway, on to the carpet in the common area hallway, into the SMOLKERS' home, to be  
6 deposited on the SMOLKERS' furniture furnishings and clothing, and to be deposited on the  
7 SMOLKERS.

8 69. The SMOLKERS notified CURRENT RESIDENTS, CIPRIANO, and PACIFIC  
9 VILLAS (collectively "CURRENT RESIDENTS PLUS"), and each of them, of the danger  
10 presented to the SMOLKERS and to the common areas of the CONDOMINIUM COMPLEX by  
11 CURRENT RESIDENTS PLUS' refusal and failure to deal with unsanitary and dangerous  
12 conditions in the common areas: leaks, moisture, dryrot, deteriorated (termite eaten) structure,  
13 termites, SYLOID 244 in the common areas of the CONDOMINIUM COMPLEX. The  
14 SMOLKERS notified all cross-defendants, and each of them, that HOME SAVING had applied a  
15 pesticide, SYLOID 244, in the walls and ceilings of the common areas, for the purpose of  
16 eradicating termites, which it is against the law to own possess or use for the purpose of  
17 eradicating termites. [SYLOID 244 is the trade name of a product manufactured by GRACE  
18 DAVISON.] The SMOLKERS notified cross-defendants, and each of them, that HOME  
19 SAVING was cited for violating state pest control laws by the State of California for using  
20 SYLOID 244, an unregistered economic poison, for pest control purposes, and provided cross-  
21 defendants, and each of them, with a copy of the citation issued to HOME SAVING.

22 70. Cross-defendants, and each of them, refused to take steps to prevent and/or to  
23 minimize the release of irritating toxic poisonous substances into the atmosphere of the common  
24 area hallway, or to minimize or to prevent the release of irritating toxic poisonous substances into  
25 the atmosphere of the SMOLKERS' home from the common areas. CURRENT RESIDENTS  
26 PLUS, and each of them, refused to take steps do necessary repair work in the common area to  
27 prevent water damage to the SMOLKERS' property and to the common areas of the  
28

1 CONDOMINIUM COMPLEX when it rained, or to clean up water damaged materials in the  
2 common area, or to keep the common area hallway carpet clean, or to repair or to clean water  
3 damaged carpet and drop ceiling in the common area hallway, or to take steps to prevent the  
4 termites infesting the building from continuing to destroy the common areas of the  
5 CONDOMINIUM COMPLEX.

6 71. The SMOLKERS are, and at all times herein mentioned were, financially unable to  
7 mitigate losses and unable to single handedly properly maintain, repair and operate the common  
8 areas of the CONDOMINIUM COMPLEX.

9 72. GRACE is, and at all times herein mentioned was, a Delaware corporation directly  
10 doing business in California and also doing business in California through its business unit, and  
11 subsidiary corporation, GRACE DAVISON. In or about the second half of 1996, GRACE  
12 DAVISON and GRACE, with knowledge of the dangerous propensities of SYLOID 244 (a  
13 product consisting of three micron particles of synthetic amorphous silica dust), and its unfitness  
14 and danger to human occupants inhabiting an atmosphere containing SYLOID 244, and with  
15 knowledge that it was against the law to distribute, sell, offer for sale, hold for distribution,  
16 deliver, offer to deliver, release for delivery or manufacture SYLOID 244 for use as a pesticide,  
17 sold and delivered SYLOID 244 in the form of 3 micron particles of silica dust to HOME  
18 SAVING for use as a pesticide in the CONDOMINIUM COMPLEX; to be applied in the  
19 CONDOMINIUM COMPLEX by HOME SAVING via HOME SAVING's "proprietary  
20 pesticide sandblasting system." Due to its inherent characteristics, no safe design of SYLOID 244  
21 is possible for use of SYLOID 244 as a pesticide in HOME SAVING's "proprietary sandblasting"  
22 pest control process.

23 73. SYLOID 244 is an irritating toxic poisonous dust capable of causing dermatitis, lung  
24 damage and dried out mucous membranes if it comes in contact with or is inhaled by a human  
25 being. At the time of GRACE's and GRACE DAVISON's sales and delivery of SYLOID 244 to  
26 HOME SAVING, SYLOID 244 was not registered for use as a pesticide with either the US EPA  
27 or with the State of California. In October 1996, HOME SAVING "sandblasted" SYLOID 244,  
28

1 in the form it was received from GRACE DAVISON and GRACE, into the structural voids of the  
2 CONDOMINIUM COMPLEX for the purpose of eradicating existing termite infestations in the  
3 CONDOMINIUM COMPLEX, and to prevent future termite infestations, by blasting SYLOID  
4 244 through holes drilled into the walls and ceilings of the CONDOMINIUM COMPLEX at a  
5 pressure of around 125 pounds per square inch, with knowledge that the SYLOID 244 blasted  
6 into the structure would be directly deposited in the living areas of the SMOLKERS' home, that  
7 possession and/or storage of the unregistered pesticide SYLOID 244 in the structural voids of the  
8 common areas of the CONDOMINIUM COMPLEX is illegal and would make each condominium  
9 unit in the CONDOMINIUM COMPLEX unmarketable.

10 74. HOME SAVING applied SYLOID 244 received from GRACE DAVISON and  
11 GRACE in the CONDOMINIUM COMPLEX in HOME SAVING's customary way, without  
12 giving clear written notice to Gary Smolker of work to be performed as required by the  
13 *California Business & Profession Code*. As HOME SAVING applied SYLOID 244 in the  
14 CONDOMINIUM COMPLEX, SYLOID 244 was directly discharged into the condominium unit  
15 owned by Gary Smolker in which the SMOLKERS reside without the SMOLKERS' consent. It  
16 was against the law for GRACE DAVISON to manufacture, sell and deliver SYLOID 244 and  
17 against the law for GRACE to sell and deliver SYLOID 244 to HOME SAVING for use as a  
18 pesticide. It was against the law for HOME SAVING to apply SYLOID 244 in the  
19 CONDOMINIUM COMPLEX. *California Food & Agriculture Code* § 12993; 7 *US Code*  
20 §136a(a). *Business & Professions Code* §§ 8538, 8553, 8638, 8641, 8642, 8643, 8648, 8695.  
21 *California Code of Administrative Regulations Title 3 Division 6*, §§ 6600, 6614, 6616. *Penal*  
22 *Code* §§ 374.8 and 594(a).

23 75. SYLOID 244 is an abrasive desiccant, a "super absorbent and/or adsorbent sponge."  
24 SYLOID 244 can capture (absorb or adsorb) molecules and chemicals in the atmosphere or in  
25 liquid or solid mediums which any surface of SYLOID 244 comes in contact with. The SYLOID  
26 244 manufactured and sold by GRACE DAVISON and GRACE to HOME SAVING was in the  
27 form of respirable silica dust particles, which are invisible to the naked eye. These "invisible"

1 particles are capable of entering the human body through inhalation and then compromising the  
2 body's immune system. These "invisible" particles are also capable of causing respiratory  
3 problems, such as reactive airway disease, pneumoconiosis, and silicosis after they have been  
4 inhaled. Silica particles of the size and type constituting SYLOID 244 can enter the lungs and  
5 make their way to the alveolar regions of the lungs. The alveolar are small sacks at the end of the  
6 respiratory tract, where diffusion of molecules to the blood occurs. Silica particles of the size and  
7 type applied by HOME SAVING in the CONDOMINIUM COMPLEX can penetrate through the  
8 alveolar lining and injure the endothelium of the neighboring capillary. This injury causes the  
9 semi-permeable capillary to become completely permeable, thereby removing the capillaries  
10 selectivity. Once the silica particles are in the capillaries, they can break the red blood cells'  
11 membranes ultimately causing cell death. The silica surface of the particles applied in the  
12 CONDOMINIUM COMPLEX can interact with cell and plasma contents disrupting normal  
13 hydrogen bonds causing natural polymers to coagulate and precipitate and causing proteins, which  
14 rely on hydrogen bonding for shape and function, to become denatured. As the silica particles  
15 absorb water, they dry the mucous membranes and deposit in the lymph nodes and the  
16 macrophages. The macrophages are a key part of the immune system's defense. Silica particles  
17 applied in the CONDOMINIUM COMPLEX by HOME SAVING can cause macrophages to  
18 secrete additional unnecessary lysosomal enzymes and can block the immune system's response  
19 making people more susceptible to bacterial infection. Infection and inflammation are associated  
20 with inhalation of silica particles of the type and size constituting SYLOID 244. Contact with  
21 SYLOID 244 dries out mucous membranes, which can cause dry mouth, sore lips, sore throats,  
22 burning nostrils, burnt esophagus, etc. Dermal contact with SYLOID 244 can cause dermatitis.  
23 Silica is a known carcinogen. As a direct and proximate result of the acts and omissions of cross-  
24 defendants, and each of them, the SMOLKERS, and each of them, involuntarily came in contact  
25 with SYLOID 244, involuntarily inhaled SYLOID 244, and were injured as a direct and  
26 proximate result thereof.

1           76. HOME SAVING illegally and negligently applied 30 3/4 pounds of SYLOID 244 in  
2 the common areas of the CONDOMINIUM COMPLEX, and negligently applied Dursban in the  
3 garage on the SMOLKERS' side of the CONDOMINIUM COMPLEX. HOME SAVING drilled  
4 a series of holes in the walls and ceilings in the SMOLKERS' home, and in other condominium  
5 units in the CONDOMINIUM COMPLEX, and in the garage where the SMOLKERS park their  
6 automobiles, in an improper manner that was without the SMOLKERS' consent. Several holes  
7 were drilled at a time in walls and ceilings in the CONDOMINIUM COMPLEX. Thereafter,  
8 HOME SAVING exploded SYLOID 244 through these holes under an explosive pressure of  
9 approximately 125 pounds per square inch. As pesticide (SYLOID 244) was blasted into one  
10 hole under this explosive pressure, pesticide (SYLOID 244), and other materials that had been in  
11 the wall voids and ceiling voids, were exploded out of adjacent hole(s), light sockets, phone  
12 jackets and other openings, and were directly discharged into the interior living areas of the  
13 SMOLKERS' home, while the pesticide application procedure was on-going. FREDERICKS, as  
14 president of PACIFIC VILLAS and as representative of all co-owners of the common area of the  
15 CONDOMINIUM COMPLEX, personally monitored HOME SAVING's work. FREDERICKS  
16 observed HOME SAVING drill holes in the walls and ceilings of the condominium units.  
17 FREDERICKS observed HOME SAVING blast pesticide dust into the walls and ceilings of the  
18 condominium through the holes HOME SAVING had drilled in the walls and ceilings.  
19 FREDERICKS observed clouds of pesticide dust being blasted out of one of the holes drilled by  
20 HOME SAVING and out of light sockets and phone jacks and being discharged directly into the  
21 living area of individual condominium units, while HOME SAVING was blasting pesticide dust  
22 into an adjacent hole. FREDERICKS understood that pesticide dust was being blasted into the  
23 living areas of individual condominium units by HOME SAVING, but did nothing to stop HOME  
24 SAVING.

25           77. HOME SAVING did not seal openings in the CONDOMINIUM COMPLEX through  
26 which pesticide would be exploded and discharged into the living areas of individual condominium  
27 units before, during, or after HOME SAVING's pesticide blasting procedure. No precautions  
28



1 were taken by HOME SAVING to prevent the pesticide blasted by HOME SAVING into the  
2 walls and ceilings of the CONDOMINIUM COMPLEX from being discharged directly into the  
3 living spaces in individual condominium units. HOME SAVING did not seal openings through  
4 which pesticide could enter into living areas of the CONDOMINIUM COMPLEX. The explosive  
5 pressure force of the HOME SAVING's pesticide blasting procedure created holes and openings  
6 in the structure. HOME SAVING left holes HOME SAVING had created in the walls and  
7 ceilings in the SMOLKERS' home and in the common area hallway unsealed. Holes created by  
8 HOME SAVING in the CONDOMINIUM COMPLEX destroyed the integrity of the structure of  
9 the CONDOMINIUM COMPLEX.

10 78. In December 1996, January 1997 and February 1997, the SMOLKERS complained to  
11 HOME SAVING that HOME SAVING had introduced irritating poisonous toxic substances in to  
12 the SMOLKERS' home; the SMOLKERS asked HOME SAVING to clean up the mess HOME  
13 SAVING had made in the SMOLKERS' home, and asked HOME SAVING for information  
14 concerning the health effects and toxicological properties of the pesticides HOME SAVING had  
15 applied in the CONDOMINIUM COMPLEX. In December 1996 and January 1997, HOME  
16 SAVING personnel returned to the SMOLKERS' home. During these visits, HOME SAVING  
17 personnel negligently performed repair work on the walls and ceilings in the SMOLKERS' home  
18 which created an unsightly mess and did not seal all the openings through which pesticide was  
19 entering into the SMOLKERS' home, negligently performed clean-up work in such a way as to  
20 recirculate SYLOID 244 that had settled onto carpets and hard surfaces in the SMOLKERS'  
21 home back into the air in the SMOLKERS' home, and assured the SMOLKERS that they had  
22 cleaned up all the pesticide on the SMOLKERS' carpets furniture and furnishings, that they had  
23 sealed all the holes through which pesticide was entering into the SMOLKERS' home and that  
24 SYLOID 244 was a harmless substance that had no deleterious properties that could possibly  
25 cause any physical irritation or annoyance or adverse health effects. In December 1996 and  
26 February 1997, Gary Smolker spoke to cross-defendant RIKK THOMPSON ("THOMPSON").  
27 In December 1996, January and February 1997 Gary Smolker spoke to MORRIS. THOMPSON  
28



1 and MORRIS represented themselves to be HOME SAVING's licensed experts on pesticides and  
 2 intimately familiar with the pesticides applied by HOME SAVING in the SMOLKERS' home.  
 3 THOMPSON and MORRIS told Gary Smolker that pesticide injected in the SMOLKERS' home  
 4 by HOME SAVING was visible to the naked and if it got on the carpets or furniture in the  
 5 SMOLKERS' home would be visible to the naked eye. THOMPSON and MORRIS also told  
 6 Gary Smolker that if the pesticide injected in the SMOLKERS' home got came in contact with  
 7 human skin or was inhaled it would not cause any irritation, could not cause any adverse health  
 8 effect to human beings and was harmless to human beings. THOMPSON and MORRIS gave  
 9 Gary Smolker a written MATERIAL SAFETY DATA SHEET for SYLOID 244 ("MSDS")  
 10 which they told Gary Smolker fully described the properties and regulatory approval of the  
 11 pesticide applied in the SMOLKERS' home by HOME SAVING. The MSDS indicates SYLOID  
 12 244 is registered and approved by the US EPA for use as a pesticide. THOMPSON and  
 13 MORRIS knew SYLOID 244 was not registered and approved for use as a pesticide by the US  
 14 EPA or by the State of California, that HOME SAVING had been ordered to stop using SYLOID  
 15 244 as a pesticide because SYLOID 244 was not registered for use as a pesticide and that  
 16 someone had had her entire esophagus burnt up by inhaling SYLOID 244 applied in her home  
 17 when THOMPSON and MORRIS gave Gary Smolker the MSDS and told Gary Smolker that  
 18 SYLOID 244 was harmless.

19 79. In March 1997, Gary Smolker notified GRACE and GRACE DAVISON that his  
 20 home had been contaminated with SYLOID 244, that SYLOID 244 was in the walls cavities  
 21 surrounding his home, that he was suffering adverse health effects from exposure to SYLOID 244  
 22 and asked for information concerning the health effects and toxicological properties of SYLOID  
 23 244, use restrictions on use of SYLOID 244 as a pesticide, or otherwise, whether the  
 24 SMOLKERS were being exposed to danger under these circumstances, and to be warned about  
 25 any danger the Smolkers could be exposed to due the presence of SYLOID 244 in their home and  
 26 in the walls and ceilings surrounding the living areas of their home. Mr. Smolker also asked  
 27 GRACE and GRACE DAVISON how to remove the SYLOID 244 that had been discharged into  
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1 the SMOLKERS' home and from the structural voids in the walls and ceilings surrounding his  
2 home. Communications went on between Gary Smolker, on the one hand and GRACE and  
3 GRACE DAVISON, on the other hand, during March, April, May and July 1997. During these  
4 communications GRACE and GRACE DAVISON failed to take reasonable steps to protect the  
5 SMOLKERS from being injured from exposure to SYLOID 244. GRACE and GRACE  
6 DAVISON gave Gary Smolker misleading and incorrect information and concealed from Gary  
7 Smolker that inhaling SYLOID 244 could cause serious respiratory problems, that SYLOID 244  
8 was not registered with the US EPA or the State of California for use as a pesticide, that HOME  
9 SAVING had been ordered to cease using SYLOID 244 as a pesticide, and that it was not safe to  
10 have SYLOID 244 in the SMOLKERS' home or that the SYLOID 244 in the walls and ceilings  
11 would continue to enter the living areas of the SMOLKERS' home whenever the wind blew, the  
12 building vibrated, there were temperature changes, etc.

13 80. In or about March 1997 through July 1997, and repeatedly thereafter, Gary Smolker  
14 notified and made claims to various insurance carriers for property damage losses and medical  
15 expenses covered by policies issued by these carriers. The SMOLKERS notified each of these  
16 carriers that the SMOLKERS were suffering on-going adverse health effects and injuries due to  
17 the presence of irritating toxic poisonous substances in the CONDOMINIUM COMPLEX, in  
18 their home, and in their automobiles. These insurance carriers were promptly put on notice that  
19 any delay in processing the SMOLKERS' claim would result in physical damage to the  
20 SMOLKERS and to their property. The insurance carriers notified were cross-defendants Truck  
21 Insurance Exchange ("TIE"), Farmers Insurance Group of Companies ("FIG"), California  
22 Insurance Company ("CAINCO"), Coregis Insurance Company ("CIC"), Reliance Insurance  
23 Company ("RELIANCE"), Frontier Pacific Insurance Company ("FRONTIER"), and TIG. The  
24 SMOLKERS asked each of these carriers to explain insurance benefits provided under their  
25 respective insurance policies that were, or might be, applicable to the injuries, losses, and  
26 expenses suffered by the SMOLKERS and/or to costs necessary to remediate contamination  
27 and/or to repair property damage and/or to replace damaged and/or contaminated property.

1           82. The SMOLKERS repeatedly notified REQUESTERS, and each of them, of the  
2 injuries the SMOLKERS had suffered and were suffering, of the need to repair the common areas  
3 to prevent further injury to the SMOLKERS, that any delay in repairing the common areas would  
4 result in physical damage to the SMOLKERS and to their property, and how the individual  
5 conduct of REQUESTERS, and each of them, was causing injury to the SMOLKERS. While the  
6 HOLLANDS were in escrow to purchase Unit #6 from KAY, or shortly after the HOLLANDS  
7 purchased Unit #6 from KAY, the SMOLKERS notified the HOLLANDS of the injuries the  
8 SMOLKERS had suffered and were suffering, of the need to repair the common areas to prevent  
9 further injury to the SMOLKERS, that any delay in repairing the common areas would result in  
10 physical injury to the SMOLKERS and to their property, and thereafter repeatedly notified the  
11 HOLLANDS how the HOLLANDS' individual conduct was causing injury to the SMOLKERS.

12           83. In March 1997 the SMOLKERS submitted a written claim for insurance benefits to  
13 TIE and FIG. FIG is a joint venture between a group of companies, including cross-defendants  
14 Farmers Group, Inc. ("FGI"), Truck Underwriters Association ("TUA"), and TIE. This group of  
15 companies jointly market themselves; jointly sell and administer claims under insurance policies  
16 they jointly sell; pool their risks; and jointly administer the businesses of the insurance companies  
17 whose policies they sell and administer. FGI is, and at all times material to this action was, the  
18 managing partner and chief administrator of the affairs of FIG. In April 1997 Gary Smolker was  
19 advised that the claim the SMOLKERS had submitted to TIE and FIG had been transferred to the  
20 FIG's environmental claims office for administration and investigation. In May, 1997, Gary  
21 Smolker, was contacted by Raymond Holybee, who identified himself as being an environmental  
22 claims expert and the managing agent of TIE and FIG in charge of the SMOLKERS' claim. Mr.  
23 Holybee said that TIE and FIG would take care of the contamination problem by cleaning up the  
24 SMOLKERS' home, starting with having the contamination removed from the carpets and air  
25 handling equipment in the SMOLKERS' home. Mr. Holybee also said TIE and FIG would make  
26 arrangements with cross-defendants Coregis Group, Inc. ("COREGIS"), CAINCO, CIC, and  
27 HOME SAVING to remove contamination from the SMOLKERS' home. At the time TIE and  
28

1 FIG made these commitments, the SMOLKERS had a substantial long term direct relationship  
2 with TIE and FIG as intended beneficiaries, direct insured and additional insured under insurance  
3 policies FIG and TIE had issued in 1986 and renewed continuously thereafter that were then in  
4 force. The SMOLKERS had paid insurance premiums due under these policies since 1986.  
5 These policies provide coverage for cost of repair or replacement of damaged common areas,  
6 reimbursement for loss of use of common area, and payment of medical expenses for medical  
7 expenses incurred with respect to any injury which occurs as a result of PACIFIC VILLAS  
8 operation of the CONDOMINIUM COMPLEX.

9 84. In May, 1997, Gary Smolker was contacted by Ms. Carol Trimble, who identified  
10 herself as a pesticide expert who worked for CIC and COREGIS. Ms. Trimble told Mr. Smolker  
11 that CIC insured HOME SAVING. Ms. Trimble further told Mr. Smolker that CIC, COREGIS,  
12 and HOME SAVING wanted to fix the pesticide contamination problem created by HOME  
13 SAVING and that Ms. Trimble was in charge of making arrangements to do that. Ms. Trimble  
14 said she would answer any questions Mr. Smolker had and she would send an industrial hygienist  
15 to the SMOLKERS' home to investigate the SMOLKERS' home and to make recommendations  
16 on how to fix the pesticide contamination problem. Ms. Trimble said she would get back to Mr.  
17 Smolker that afternoon with answers to questions Mr. Smolker had asked her about the pesticide  
18 applied in the SMOLKERS' home. At the time of this conversation, Mr. Smolker understood the  
19 SMOLKERS were considered a valuable customer by HOME SAVING and that HOME  
20 SAVING and MORRIS had turned over this problem to their insurance carrier because it was  
21 beyond HOME SAVING's and MORRIS' abilities to fix the problem because MORRIS had  
22 previously explained to Mr. Smolker that MORRIS and HOME SAVING considered the  
23 SMOLKERS to be a valuable customer and that MORRIS would turn this problem over to his  
24 insurance carrier to take care of if MORRIS was unable to provide fast results that were  
25 satisfactory to the SMOLKERS. At the time of this conversation, the SMOLKERS had a  
26 substantial relationship with COREGIS and CIC in that COREGIS and CIC administered the  
27 affairs of HOME SAVING's general liability carrier, CAINCO, and CIC was personally  
28

1 responsible for the insurance obligations of CAINCO. HOME SAVING had purchased medical  
2 payment coverage for the benefit of others, who were injured in connection with HOME  
3 SAVING's operations from CAINCO.

4 85. FIG, TIE, FGI, TUA, COREGIS, CIC, and CAINCO (collectively "PROMISORS"),  
5 and each of them were repeatedly invited to inspect the SMOLKERS' home. As of August, 22,  
6 1997 PROMISORS had not yet inspected the SMOLKERS' home. On August 22, 1997, Gary  
7 Smolker received a letter from Ms. Trimble, on behalf of PROMISORS, and each of them,  
8 requesting that the SMOLKERS not alter the condition of their home in any way before the  
9 SMOLKERS' home was inspected and tested by PROMISORS. Thereafter, PROMISORS, and  
10 each of them, were repeatedly invited to inspect and to test the SMOLKERS' home and to  
11 inspect and test the SMOLKERS' personal belongings, but never did so.

12 86. FIG, TIE, FGI, TUA, COREGIS, CIC, and CAINCO (collectively "PROMISORS")  
13 did not carry out their investigation and/or repair work in a timely or prudent manner. In spite of  
14 a lot of invitations and communication from the SMOLKERS to PROMISORS, and each of them,  
15 PROMISORS never inspected the SMOLKERS' home, never did anything to remove pesticide  
16 contamination in the SMOLKERS' home, never did any repair work in the SMOLKERS' home,  
17 and never did repair work in the common areas of the CONDOMINIUM COMPLEX. As a  
18 direct and proximate result of the delay of PROMISORS, and each of them, in investigating and  
19 processing the SMOLKERS' claim, the SMOLKERS suffered physical damage to their persons  
20 and property, incurred medical , x-ray, lab tests, and dental expenses, and suffered loss of and  
21 spoliation of evidence. As a direct and proximate result of the failure of PROMISORS, and each  
22 of them, to do promised clean up and remediation work in the SMOLKERS' home, the  
23 SMOLKERS suffered physical damage to their persons and property, and incurred medical , x-  
24 ray, lab tests, and dental expenses.

25 87. In July, 1997, Gary Smolker was contacted by Jamie Doody, who identified herself as  
26 a managing agent of RELIANCE in charge of taking care of investigation and administration of  
27 the SMOLKERS' claim under a bond (Reliance Bond Number B2443649) RELIANCE had  
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1 issued to protect the general public against losses damages and injuries caused by HOME  
2 SAVING. Ms. Doody asked for information which was provided in July 1997. Ms. Doody said  
3 RELIANCE would review the SMOLKERS' claim in detail and advise the SMOLKERS of the  
4 results of RELIANCE's investigation and of RELIANCE's decision on the SMOLKERS' claim  
5 within 30 days. RELIANCE did not carry out its professional functions of claims administration  
6 and claims investigation in a timely and prudent manner. RELIANCE refused to inspect the site  
7 or the work performed by HOME SAVING. RELIANCE bombarded the SMOLKERS with  
8 questions the SMOLKERS had already answered, ignored the answers the SMOLKERS gave to  
9 RELIANCE. RELIANCE failed to render a prompt and professional investigation of the  
10 SMOLKERS' claim. As a direct and proximate result of RELIANCE's failure to carry out its  
11 professional functions of claims administration and claims investigation in a timely and prudent  
12 manner the SMOLKERS suffered physical damage to their person and property, incurred medical,  
13 x-ray, and dental expenses, and suffered loss of evidence.

14 88. In August 1997, Gary Smolker was contacted by FRONTIER concerning the  
15 SMOLKERS' claim under Bond No. 824118 which FRONTIER had issued to protect the general  
16 public from loss or injury resulting from the conduct of MORRIS in connection with home  
17 improvements and/or from fraud in the execution or performance of a construction contract.  
18 "Home improvement" means the installation of home improvement goods or the furnishing of  
19 home improvement services. Home improvement goods and services include, but are not limited  
20 to, termite extermination. *Business & Professions Code Section 7151.*

21 89. FRONTIER advised Gary Smolker that FRONTIER would advise Gary Smolker of  
22 FRONTIER's position within 60 days. FRONTIER did not carry out its professional functions of  
23 claims administration and claims investigation in a timely and prudent manner. FRONTIER was  
24 invited to inspect the SMOLKERS' home and to see the home improvement goods and services  
25 that had been provided to the SMOLKERS under MORRIS' general contracting license,  
26 supervision and control. FRONTIER failed and refused to inspect the SMOLKERS' home. As a  
27 direct and proximate result of FRONTIER's failure to carry out its professional functions of  
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1 through the claims process, 24 hours a day, 7 days a week, 365 days a year including holidays.  
2 TIG promised that anytime the SMOLKERS needed help a trained TIG service representative  
3 would be there to help the SMOLKERS, and would provide valuable referral services for auto  
4 losses and for homeowner's losses. TIG promised, and undertook, to provide the SMOLKERS  
5 with timely response for restoration of damaged property, including but not limited to emergency  
6 protection of the contents of the SMOLKERS' home, and prompt inspection of all property  
7 owned by the SMOLKERS which the SMOLKERS claimed was damaged.  
8

9 91. On or about March, 1997, and repeatedly thereafter, the SMOLKERS submitted  
10 claims to TIG for property damage, medical expenses, expenses for repair of the SMOLKERS'  
11 home and automobiles necessary to mitigate damages to the SMOLKERS' persons and personal  
12 property, living expenses to move out of the SMOLKERS' home until irritating toxic  
13 contaminants were removed and contamination was remediated, repair or replacement of the  
14 SMOLKERS' automobiles and/or rental expense to rent different automobiles until new  
15 automobiles were obtained and/or irritating toxic contamination was removed from each of the  
16 SMOLKERS' automobiles. The SMOLKERS also requested that a structural engineering  
17 inspection be done of their home and requested reimbursement of costs paid by the SMOLKERS  
18 for a structural engineering inspection of the SMOLKERS' home. Each of these claims are, and  
19 were, covered by one or more of the insurance policies then in force, which had been issued to the  
20 SMOLKERS by TIG, which policies are described in paragraphs 16, 17, 24, and 90 hereof. The  
21 SMOLKERS requested prompt inspection of their damaged property, restoration of damaged  
22 property and emergency protection of the contents of the SMOLKERS' home and of the  
23 SMOLKERS' automobiles. TIG was immediately and repeatedly put on notice that any delay in  
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1 investigating or administering the SMOLKERS' claims would result in physical damage to the  
2 SMOLKERS and to the SMOLKERS' property. Thereafter, TIG delayed in making an  
3 inspection of the damages and injuries suffered by the SMOLKERS and delayed in making an  
4 investigation of the cause of damages and injuries suffered by the SMOLKERS. TIG sent  
5 unqualified people to inspect the SMOLKERS' home and automobiles. TIG ignored information  
6 provided to TIG by the SMOLKERS. TIG refused and failed to respond to questions received  
7 from the SMOLKERS concerning the SMOLKERS' claims and insurance benefits provided under  
8 insurance policies TIG had issued to the SMOLKERS. The SMOLKERS repeatedly notified TIG  
9 of the injuries the SMOLKERS were suffering as a result of TIG's failure to carry out TIG's  
10 professional functions of claims administration and investigation in a timely and prudent manner.  
11 TIG failed to administer and investigate the SMOLKERS' claims in a timely and prudent manner.  
12 As a direct and proximate result of TIG's delay in investigating the SMOLKERS' claim in a  
13 prudent manner the SMOLKERS, and each of them, suffered injuries to their person and  
14 property, incurred medical, x-ray, and dental expenses, structural engineering expenses, and  
15 suffered loss of evidence of the cause of the damages the SMOLKERS had suffered and were  
16 suffering.

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20 92. The true names or capacities, whether individual, corporate, associate or otherwise,  
21 of cross-defendants ROES 1 through 200, inclusive, and each of them, are unknown to cross-  
22 complainants, who therefore sue said cross-defendants by such fictitious names and ask leave to  
23 amend this Cross-Complaint to show said cross-defendants' true names and capacities when the  
24 same have been ascertained. Cross-complainants are informed and believe, and thereupon allege,  
25 that each of the cross-defendants designated herein as a ROES 1 through 160 inclusive is  
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1 negligently, fraudulently, contractually or otherwise legally responsible in some manner for events  
2 and happenings herein referred to and negligently or otherwise unlawfully caused or is legally  
3 responsible for injuries and damages to cross-complainants as herein alleged; each of the cross-  
4 defendants designated herein as ROES 161 through 171 inclusive are insurance carrier who owe  
5 medical payment benefits to cross-complaints but whose identity is unknown at this time; each of  
6 the cross-defendants designated herein as ROES 172 through 181 became an owner of a  
7 condominium unit at the CONDOMINIUM COMPLEX after January 1, 1998 and is an owner of  
8 a condominium unit thereat; and each of the cross-defendants designated herein as ROES 182  
9 through 200 own an interest in a condominium unit in the CONDOMINIUM COMPLEX, but  
10 their identity an/or interest was unknown to cross-complainants on August 12, 1999.  
11  
12

13 93. Before October 11, 1996, and before the acts complained about herein effected the  
14 SMOLKERS, the SMOLKERS' home was a safe and peaceful place to be, the SMOLKERS were  
15 in good health energetic and happy; the SMOLKERS' children were in good health energetic and  
16 happy; and the SMOLKERS' business was a success. As a direct and proximate result of the  
17 wrongful conduct, acts and/or omission of cross-defendants, and each of them, the SMOLKERS'  
18 home stopped being a safe place of peaceful quiet enjoyment where the SMOLKERS could rest,  
19 recuperate, and enjoy life. Instead, the SMOLKERS' home became a place of danger and pain,  
20 where the SMOLKERS could not rest or recuperate, a place where the SMOLKERS were forced  
21 to live in pain misery and worry. When in his home, Gary Smolker was exposed to irritating toxic  
22 chemicals that caused Gary Smolker to have such severe sore throats, dried lips, dry mouth, and  
23 headaches that were so painful as to be equivalent to being tortured. As a direct and proximate  
24 result of the conduct or omission of cross-defendants, and each of them, the health and physical  
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1 and mental well being of GARY SMOLKER, ALICE SMOLKER and of their two minor  
2 daughters has been damaged. ALICE SMOLKER cries at night, in the morning, and during the  
3 day due to the emotional upset caused by this situation. The SMOLKERS' minor daughters can  
4 not stand living in their home, and have missed a lot of school due to not being able to sleep and  
5 being in pain due to being irritated by toxic substances in the SMOLKERS' home related to the  
6 conduct of cross-defendants, and each of them. The SMOLKERS' peace of mind has been  
7 destroyed. The SMOLKERS' business has been severely adversely impacted; the SMOLKERS'  
8 living standard and the living standard of their minor children has been severely diminished; the  
9 SMOLKERS' life style and the life style of their minor children has been severely diminished; the  
10 SMOLKERS' have lost the full peaceful use of their home, and have lost the full peaceful use of  
11 their automobiles and their personal belongings. The SMOLKERS' family life, social life and  
12 business life have been detrimentally interfered with. The SMOLKERS are unable to sell their  
13 home, or to rent it, and have been compelled to and, have made, repairs to their home and have  
14 replaced personal belongings, carpeting and furniture in an attempt to make it possible to live in  
15 their home without being in pain. The SMOLKERS have been compelled to get into litigation  
16 with their neighbors in order to arrive at a fix for the pesticide contamination problem. As a  
17 direct and proximate result of the wrongful conduct and/or omissions of cross-defendants, and  
18 each of them, the SMOLKERS have suffered from fatigue, physical and emotional pain and burn  
19 out, and have been forced to live like "zombies," and the quality of work the SMOLKERS can do  
20 for themselves and/or for other people has been gravely diminished. As a direct and proximate of  
21 the conduct of cross-defendants and each of them the SMOLKERS' free time for relaxation,  
22 recuperation and fun has been greatly diminished to almost zero. As a direct and proximate result  
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1 of the wrongful conduct or omission of cross-defendants, and each of them, the SMOLKERS and  
2 their children have been exposed to toxic chemicals and have incurred and/or paid medical and  
3 dental expenses related to injuries caused by such exposure; and have also paid or incurred related  
4 charges for laboratory tests, pathology reports, hospital services, and medicines. The  
5 SMOLKERS have paid veterinary expenses related to their dog's exposure to said toxic  
6 chemicals. In the future the SMOLKERS will be required to continue to incur and to pay  
7 expenses for monitoring of their physical condition, medical care, medical tests and medicines  
8 related to their exposure to toxic substances in their home. As a direct and proximate result of  
9 the wrongful conduct or omission of cross defendants, and each of them, the SMOLKERS, and  
10 each of them, have suffered severe emotional distress and anxiety and frustration and humiliation  
11 from being unable to provide the life style they are accustomed to for their children; the  
12 SMOLKERS suffered emotional distress from being rendered unable to provide fundamental safe  
13 shelter for their children, and have been rendered unable to provide a peaceful safe living  
14 environment in their home for themselves and their children. As a direct and proximate result of  
15 the wrongful conduct or omission of cross-defendants, and each of them, the SMOLKERS have  
16 suffered mental distress and continue to suffer mental distress from watching their children suffer  
17 bodily pain and injury caused by the wrongful conduct or omission of cross defendants, and each  
18 of them. As a direct and proximate result of the wrongful conduct or omission of cross-  
19 defendants, and each of them, the SMOLKERS lost earning capacity and income, and have been  
20 and are being deprived of their ability to operate their business; the SMOLKERS have been  
21 deprived of the ability to earn a living from their labor, have been deprived of their ability to  
22 pursue their careers, have been deprived of their ability to have their normal social life family life  
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1 and business life. The SMOLKERS' earning capacity, family life and social life have been  
2 significantly damaged. The SMOLKERS have been forced to spend their savings to fund this  
3 litigation and to live on borrowed money. The SMOLKERS have been and are being forced to  
4 live in fear and dread over what kind of acute physical injuries and chronic physical injuries each  
5 of them and each of their children have suffered and will suffer in the future due to being exposed  
6 to toxic and/or irritating substances in the CONDOMINIUM COMPLEX. The mental trauma of  
7 these experiences has caused the SMOLKERS to be unable to sleep, to lose the services of each  
8 other, and has interrupted their future plans and planning. As a direct and proximate result of the  
9 wrongful conduct or omission of cross-defendants, and each of them, the SMOLKERS were  
10 compelled to and did dispose of various items of personal property contaminated with irritating  
11 toxic substances, hired professional cleaners and maid services to clean various items of personal  
12 property and air handling ducts chimney and equipment, hired professional contractors to try to  
13 seal various paths of entry of pesticide dust into their home, to repair their deck, to paint the  
14 interior of their home, etc.. As a direct and proximate result of the wrongful conduct and/or  
15 omissions of cross-defendants, and each of them, the SMOLKERS were forced to move out of  
16 their home and to replace and repair various items in their home, such as their carpets and blinds,  
17 bedding , towels, beds, head board on their bed, mattresses, couches and other furniture and  
18 furnishings. As a direct and proximate result of the wrongful conduct and/or omissions of cross-  
19 defendants and each of them, the SMOLKERS, and each of them, suffered general and special  
20 damages in an amount to be proved at time of trial.

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25 **EIGHTH CAUSE OF ACTION FOR STRICT LIABILITY**  
26 **AGAINST GRACE, GRACE DAVISON, HOME SAVING AND MORRIS**  
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1           94. The SMOLKERS incorporate herein by reference as though fully set forth herein  
2 Paragraphs 18 through 21, 60 through 63, 66 through 76, 79, 92 and 93 of this cross-complaint  
3 with the same force and effect as though said paragraphs were set forth fully at this point.

4           95. At all times herein mentioned cross-defendants, and each of them, sued in this Cause  
5 of Action, manufactured, designed, sold, held for delivery, delivered, distributed, mixed,  
6 combined, released, dispensed, inspected, failed to inspect, advertised, labeled, instructed,  
7 advised, handled and/or assisted in the assembly, marketing, sale, delivery and servicing of  
8 SYLOID 244 ("Product") and the component parts thereof so that the same could be purchased  
9 and applied as a pesticide in residential structures inhabited by members of the general public and  
10 structures visited by the general public.

11           96. At all times mentioned herein, cross-defendants, and each of them, sued in this Cause  
12 of Action, knew that said Product and its component parts were to be purchased and used as a  
13 pesticide to eradicate termite infestations in inhabited residential structures, without inspection for  
14 defects by PACIFIC VILLAS, and without inspection by members of the general public such as  
15 the SMOLKERS, who would be given no warning and were given no warning that SYLOID 244  
16 could be harmful to human health if inhaled or if deposited on a person's skin.

17           97. Said Product and its component parts hereinabove referenced, were unsafe for their  
18 intended use or reasonably foreseeable uses and foreseeable misuses by reason of defects in their  
19 design, manufacture, distribution, inspection, labeling, marketing, sale, servicing, and handling so  
20 that said Product and its component parts could not be safely used when said Product left the  
21 control of each cross-defendant sued in this Cause of Action. Said Product when used as a  
22 pesticide in an inhabited residential structure, as it was in this case, did not meet the minimum  
23 safety expectations of the product's ordinary ultimate consumers and members of the general  
24 public who it was reasonably foreseeable would come in contact with it and inhale it while in a  
25 residential structure. Due to its inherent characteristic of being invisible to the naked eye, of small  
26 mass, and size, being a respirable dust and dehydrating agent, and capable of causing cancer and  
27 lung disease if inhaled or dermatitis if it came in contact with human skin, and having other  
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1 adverse toxicological results and effects on humans, no safe design of "said product" is possible  
2 for use of said product as a pesticide injected into wall voids in a residential structure as was the  
3 custom and intention of HOME SAVING with respect to HOME SAVING's application of such  
4 product in the CONDOMINIUM COMPLEX, and GRACE's and GRACE DAVISON's intention  
5 in selling said product to HOME SAVING for use as a pesticide. However, the manufacturer,  
6 distributor and applicator of "said product" represented it as being inherently safe to Gary  
7 Smolker and to its ordinary ultimate consumers. At all times herein mentioned cross-defendants,  
8 and each of them, sued in this Cause of Action did not adequately warn the SMOLKERS of  
9 deleterious effects that could result from inhaling and/or being (continuously) exposed to  
10 SYLOID 244. At all times herein mentioned the risks and deleterious effects of inhaling and/or  
11 being continuously exposed to SYLOID 244 were known or scientifically knowable to each  
12 cross-defendant sued in this Cause of Action.

13 98. The defective and dangerous character of said Product and its component parts made  
14 said Product unsafe for the use and purpose for which said Product and its component parts were  
15 intended when they were used and applied as recommended by the cross-defendants, and each of  
16 them, sued in this Cause of Action or when used in a reasonably foreseeable manner. Said  
17 product is an irritating toxic dust capable of causing dermatitis, lung damage, and dried out  
18 mucous membranes during its normal use as a pesticide applied according to HOME SAVING's  
19 "proprietary" application method.

20 99. Said Product and its component parts hereinabove referenced, were unsafe by reason  
21 of defects in their design, manufacture, labels, warnings and distribution, as hereinabove set forth  
22 in this Cause of Action. More specifically, and without limitation, said Product and its component  
23 parts hereinabove referenced were unsafe because of defects in the combining, mixing, refining,  
24 manufacturing, labeling, distribution and handling of the toxic chemicals which caused said  
25 Product, on or about October 11, 1996 and thereafter to injure the SMOLKERS, the  
26 SMOLKERS' children, the SMOLKERS' dog, and the SMOLKERS' property. All of said  
27 defects caused the SMOLKERS' injuries and damages, including those injuries and damages set  
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1 forth in paragraph 93 hereof all to the SMOLKERS' damage in an amount to be proved at time of  
2 trial. as set forth.

3 100. At all times material hereto, said cross-defendants, and each, failed to warn the  
4 SMOLKERS of the defective, faulty, unsafe, hazardous and dangerous character of said Product  
5 and failed to warn the SMOLKERS that exposure to or coming in contact with or breathing in  
6 said Product could and would cause serious injuries, or that the use or possession of said pesticide  
7 was unlawful or that "said product" was not registered as a pesticide with either the US EPA or  
8 the State of California Department of Pesticide Regulation.

9 101. The SMOLKERS were not aware of said Product's defects at any at time prior to  
10 the initial incidents which occurred on or about Oct. 11, 1996 and which caused injuries to the  
11 SMOLKERS, or for a considerable time thereafter while the SMOLKERS were trying to  
12 ascertain the health effects and toxicology of synthetic amorphous silica gel/SYLOID 244 and to  
13 make arrangements for removal of SYLOID 244 from the SMOLKERS' home and from the  
14 common areas of the CONDOMINIUM COMPLEX. Said Product failed to perform as safely as  
15 an ordinary user, such as the SMOLKERS, would expect, in that the SMOLKERS were using the  
16 product in a manner reasonably foreseeable by the cross-defendants sued in the Cause of Action  
17 and for the intended purpose for which the product was specifically supplied to HOME SAVING,  
18 which was the purpose the product was specifically supplied to REQUESTERS, namely to  
19 prevent future termite infestations and to eradicate existing termite infestations in the common  
20 areas of the CONDOMINIUM COMPLEX. As a result of said defect in said Product and its  
21 component parts, and as a result of cross-defendants' failure to warn of the deleterious effects of  
22 being exposed to said Product or the deleterious effects of inhaling said Product, on or about  
23 October 11, 1996, and continuously thereafter the SMOLKERS were caused to sustain those  
24 injuries described herein.

25 102. As a direct and proximate result of the defect and exposure of the SMOLKERS, the  
26 exposure of the SMOLKERS' children, and the exposure of the SMOLKERS' property to the  
27 product as hereinabove alleged and as direct and proximate result of the failure to warn the  
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SMOLKERS of the dangers posed by the product or how to handle the product, and as a direct and proximate result of the illegal sale and distribution of the Product and the subsequent exposure of the SMOLKERS and the SMOLKERS' children and the SMOLKERS' property to the product, the SMOLKERS sustained injuries to their property, to their business, to their earning capacity, to their health, to their strength and activity, as well as mental pain and suffering. The SMOLKERS are informed and believe and based thereon allege that they have and will continue to sustain in the future injuries to their property, to their health, strength and activity, and have suffered and will continue to suffer loss of income, loss of earning capacity, loss of business opportunities, and physical and mental pain and suffering, emotional distress, all to their general and special damage in a sum within the jurisdiction of this court, to be proved at the time of trial.

WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as hereinafter set forth.

#### NINETH CAUSE OF ACTION FOR NEGLIGENCE

#### AGAINST GRACE AND GRACE DAVISON

103. The SMOLKERS incorporate herein by reference as though fully set forth herein Paragraphs 94, 97, 99 and 102 of this cross-complaint with the same force and effect as though said paragraphs were set forth fully at this point.

104. It was a violation of state law (*Food & Agriculture* Section 12993) and negligence per se for GRACE and/or GRACE DAVISON to manufacture or sell or deliver SYLOID 244 ("Product"), or to possess SYLOID 244 in California for use as a pesticide (*Food and Agriculture* Section 12955). It was a violation of federal law (7 *US Code* Section 136(a)) and negligence per se for GRACE and GRACE DAVISON to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or to offer to deliver SYLOID 244 to HOME SAVING and/or to PACIFIC VILLAS for use as a pesticide. HOME SAVING served as GRACE's and GRACE DAVISON's distributor of SYLOID 244 to PACIFIC VILLAS. The ultimate consumers of the SYLOID 244 manufactured,



1 sold, and/or distributed and shipped by GRACE and/or GRACE DAVISON in this case  
2 (PACIFIC VILLAS, and the SMOLKERS) expected SYLOID 244 to be inherently safe due to  
3 representations made by the distributor/applicator HOME SAVING. GRACE and GRACE  
4 DAVISON thereafter ratified and backed-up HOME SAVING's claim that SYLOID 244 is an  
5 inherently safe product when applied in the atmosphere of a home that can cause no physical  
6 injury or adverse health effect if inhaled by a human being or if deposited on a human being. Due  
7 to SYLOID 244's inherent characteristics of being a respirable dust and a dehydrating agent, no  
8 safe design of SYLOID 244 is possible. It is not safe to inhale or to come in contact with  
9 SYLOID 244 in the atmosphere of residence. SYLOID 244 is an irritating toxic dust capable of  
10 causing dermatitis, dry mouth, sore throats, head aches, lung damage, and dried out mucous  
11 membranes if it comes in contact with human beings. In connection with the sale and of SYLOID  
12 244 to HOME SAVING, who served as GRACE's and GRACE DAVISON's distributor of  
13 SYLOID 244 to PACIFIC VILLAS and to the SMOLKERS, and in connection with sale of  
14 SYLOID 244 to PACIFIC VILLAS and the application of SYLOID 244 in the SMOLKERS'  
15 home and in the common areas of the CONDOMINIUM COMPLEX, adequate warnings of risks  
16 and dangers were not given by GRACE or GRACE DAVISON or by HOME SAVING to  
17 PACIFIC VILLAS or to the SMOLKERS.

18 **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
19 hereinafter set forth.

20 **TENTH CAUSE OF ACTION FOR NEGLIGENCE**

21 **AGAINST HOME SAVING, MORRIS AND THOMPSON**

22 105. The SMOLKERS incorporate herein by reference as though fully set forth herein  
23 Paragraphs 77, 78, 84 through 86, 103 and 104 of this cross-complaint with the same force and  
24 effect as though said paragraphs were set forth fully at this point.

25 106. It was negligence per se for HOME SAVING to offer to sell, to sell and to deliver  
26 SYLOID 244 to PACIFIC VILLAS for use as a pesticide to eradicate existing termite infestations  
27 and/or to prevent future termite infestations in the common areas of the CONDOMINIUM  
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1 COMPLEX. It was negligence per se for HOME SAVING to apply SYLOID 244 in the  
 2 SMOLKERS' home. It was negligence per se for HOME SAVING to directly discharge  
 3 pesticides in the SMOLKERS' home without the SMOLKERS' consent. It was negligence per se  
 4 for HOME SAVING to apply pesticides in the SMOLKERS' home without first giving the  
 5 SMOLKERS clear written notice of work to be performed by HOME SAVING. It was  
 6 negligence per se for MORRIS to allow HOME SAVING to use MORRIS' general contractor's  
 7 license in order for HOME SAVING to be able to pose as a general contractor. It was negligence  
 8 per se for HOME SAVING not to finish the work in the SMOLKERS' home that HOME  
 9 SAVING had agreed to do and to abandon the job of sealing holes in the walls and ceiling of the  
 10 SMOLKERS' home before completing the job. It was negligence per se for MORRIS and  
 11 THOMPSON to misrepresent the properties of SYLOID 244 to the SMOLKERS and to  
 12 misrepresent to the SMOLKERS that SYLOID 244 had been approved by the US EPA for use as  
 13 a pesticide and that SYLOID 244 was not toxic.

14 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
 15 hereinafter set forth.

16 **ELEVENTH CAUSE OF ACTION FOR NEGLIGENCE AGAINST**  
 17 **PACIFIC VILLAS, THE HOLLANDS, ROBBINS, BAILEY, VERDUN,**  
 18 **IVORY, FREDERICKS, AND CIPRIANO ("CURRENT RESIDENTS PLUS")**

19 107. The SMOLKERS incorporate herein by reference as though fully set forth herein  
 20 Paragraphs 2 through 4, 7, 9, 10, 12, 13, 15, 18 through 23, 60 through 66, 68 through 78, 82,  
 21 92, 93, 100, and 102 of this cross-complaint with the same force and effect as though said  
 22 paragraphs were set forth fully at this point.

23 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
 24 hereinafter set forth.

25 **TWELFTH CAUSE OF ACTION FOR NUISANCE AND MAINTENANCE**  
 26 **OF A NUISANCE AGAINST CURRENT RESIDENTS PLUS**

1           108. The SMOLKERS incorporate herein by reference as though fully set forth herein  
2 Paragraph 107 of this cross-complaint with the same force and effect as though said paragraph  
3 was set forth fully at this point.

4           109. CURRENT RESIDENTS and CIPRIANO own SYLOID 244 located in the  
5 common areas of the CONDOMINIUM COMPLEX and in the SMOLKERS' home and  
6 automobiles which contaminates the SMOLKERS' property, and except for the HOLLANDS  
7 have owned SYLOID 244 located in the common areas of the CONDOMINIUM COMPLEX  
8 since 1996. The HOLLANDS have owned SYLOID 244 located in the common areas of the  
9 CONDOMINIUM COMPLEX and in the SMOLKERS' home which contaminates the  
10 SMOLKERS' property since 1997. The SYLOID 244 owned by CURRENT OWNERS and  
11 CIPRIANO, and each of them, located in the common areas and in the SMOLKERS' home and  
12 automobiles is, and has been, offensive to the SMOLKERS' senses and has injured the  
13 SMOLKERS' health. The SYLOID 244 belonging to CURRENT RESIDENTS and CIPRIANO,  
14 and each of them, has physically damaged the SMOLKERS' property and bodies.. The SYLOID  
15 244 belonging to CURRENT OWNERS and CIPRIANO, and each of them, has interfered with  
16 the SMOLKERS' free use of the common area hallway and home and automobiles so as to  
17 interfere with the SMOLKERS comfortable enjoyment of their life and property, has made it  
18 impossible for the SMOLKERS to rent their home, has forced the SMOLKERS to move out of  
19 their home for approximately six weeks, has forced the SMOLKERS to replace the contents of  
20 their home and to have their deck rebuilt and the interior of their home painted, has made it  
21 impossible for Gary Smolker to sell his condominium unit, and has caused Gary Smolker to cease  
22 using his automobile except if he has no other way of getting somewhere. The presence of  
23 SYLOID 244 belonging to CURRENT OWNERS and CIPRIANO, and each of them, in the  
24 CONDOMINIUM COMPLEX, has caused discomfort to the SMOLKERS which has injured the  
25 SMOLKERS' health and well being and has adversely effected the SMOLKERS' ability to work,  
26 the SMOLKERS' ability to earn a living, and has caused the SMOLKERS to seek and to obtain  
27 medical attention and to incur expenses for medical consultation and treatment. The  
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1 SMOLKERS will incur additional future damages of a similar nature as long as this nuisance  
2 continues. PACIFIC VILLAS has taken no steps at any time to remove SYLOID 244 located in  
3 the CONDOMINIUM COMPLEX.. CURRENT OWNERS PLUS have not repaired the leaky  
4 roof that has been leaking water into the SMOLKERS' home since 1997, or taken steps to  
5 eradicate the termites have infested the common areas of the CONDOMINIUM COMPLEX since  
6 1997, except FREDERICKS, VERDUN and IVORY have had HOME SAVING come back to  
7 make further applications of pesticides in their individual condominium units. The presence of  
8 SYLOID 244 in the common areas constitutes an illegal and dangerous condition.

9 110. CURRENT RESIDENTS PLUS, and each of them, have purposefully refused to  
10 refrain from conduct that imposes an unreasonable risk of physical injuries on the SMOLKERS.  
11 CURRENT RESIDENTS PLUS' conduct, and the conduct of each of them, has been inconsistent  
12 with the CONDOMINIUM COMPLEX CC&Rs (governing documents), has not been in  
13 furtherance of the purposes of the common interest development (CONDOMINIUM  
14 COMPLEX), has not been in good faith, and has not been carried out in a manner in the best  
15 interests of PACIFIC VILLAS and its members, or in a manner that CURRENT RESIDENTS  
16 PLUS, or any of them believed in good faith upon reasonable investigation was in the best  
17 interests of PACIFIC VILLAS or its members. CURRENT RESIDENTS PLUS' conduct, and  
18 the conduct of each of them, has been in reckless disregard of the safety and welfare of the  
19 SMOLKERS. CURRENT RESIDENTS PLUS, and each of them, have breached the fiduciary  
20 duty each of them owe to the SMOLKERS to refrain from conduct that imposes an unreasonable  
21 risk of injury to the SMOLKERS.

22 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
23 hereinafter set forth.

24 **THIRTEENTH CAUSE OF ACTION FOR ABATEMENT OF NUISANCE**  
25 **AGAINST CURRENT RESIDENTS PLUS, HOME SAVING,**  
26 **MORRIS, GRACE AND GRACE DAVISON**

1           111. The SMOLKERS incorporate herein by reference as though fully set forth herein  
2 Paragraphs 105, and 107 through 110 of this cross-complaint with the same force and effect as  
3 though said paragraphs were set forth fully at this point.

4           112. As a result of the continuing nuisance the SMOLKERS have suffered damages  
5 including cost to repair wood portions of the common areas eaten by the termites, lost rental  
6 value of their home while the nuisance continues, cost of remediation to minimize and/or remove  
7 the poisonous substances in the common areas of the CONDOMINIUM COMPLEX, cost to  
8 replace or clean the SMOLKERS' personal property contaminated with poisonous substances up  
9 to the time the nuisance is abated. Various items of the SMOLKERS' contaminated personal  
10 property can be replaced at reasonable cost. The SYLOID 244 and other pesticides applied by  
11 HOME SAVING in the common areas pose(s) a health hazard. If abatement of the SYLOID 244  
12 in the premises is denied the owners of the CONDOMINIUM COMPLEX will be maintaining an  
13 illegal condition on the premises and will have contingent liability for anyone who is injured in the  
14 future by the SYLOID 244 and/or other poisonous substances in the common areas of the  
15 CONDOMINIUM COMPLEX. The most feasible abatement strategy is to order GRACE,  
16 GRACE DAVISON, HOME SAVING, and MORRIS to purchase the individual condominium  
17 units at their fair market value and to pay relocation costs to each of the individual condominium  
18 unit owners and to record a declaration running with the land notifying the public of the  
19 contamination in the CONDOMINIUM COMPLEX, and to order GRACE, GRACE DAVISON,  
20 HOME SAVING and MORRIS to not allow anyone to occupy the property until they  
21 demonstrate to the court's satisfaction that it is safe to occupy the property.

22           **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
23 hereinafter set forth.

24                       **FOURTEENTH CAUSE OF ACTION FOR TRESPASS**  
25                       **AGAINST CURRENT RESIDENTS PLUS, HOME SAVING AND MORRIS**

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1 113. The SMOLKERS incorporate herein by reference as though fully set forth herein  
2 Paragraph 111 of this cross-complaint with the same force and effect as though said paragraph  
3 was set forth fully at this point.

4 114. Residents plus, HOME SAVING, and MORRIS, and each of them, have caused  
5 irritating toxic poisonous particulate matter to be deposited on the SMOLKERS' property and on  
6 the SMOLKERS' bodies, without the SMOLKERS' consent, which has caused actual physical  
7 damage to the SMOLKERS' bodies and actual physical damage to the SMOLKERS' property.

8 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
9 hereinafter set forth.

10 **FIFTEENTH CAUSE OF ACTION FOR ASSAULT AND BATTERY**  
11 **AGAINST CURRENT RESIDENTS PLUS, HOME SAVING AND MORRIS**

12 115. The SMOLKERS incorporate herein by reference as though fully set forth herein  
13 Paragraphs 113 and 114 of this cross-complaint with the same force and effect as though said  
14 paragraphs were set forth fully at this point.

15 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
16 hereinafter set forth.

17 **SIXTEENTH CAUSE OF ACTION FOR WRONGFUL EVICTION**  
18 **AND WASTE AGAINST CURRENT RESIDENTS PLUS**

19 116. The SMOLKERS incorporate herein by reference as though fully set forth herein  
20 Paragraph 115 of this cross-complaint with the same force and effect as though said paragraph  
21 was set forth fully at this point.

22 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
23 hereinafter set forth.

24 **SEVENTEENTH CAUSE OF ACTION FOR CONTRIBUTION**  
25 **AND IMPOSITION OF LIEN/FORECLOSURE AGAINST**  
26 **CURRENT RESIDENTS AND CIPRIANO**

1           117. The SMOLKERS incorporate herein by reference as though fully set forth herein  
2 Paragraph 116 of this cross-complaint with the same force and effect as though said paragraph  
3 was set forth fully at this point

4           118. GARY SMOLKER has paid and continues to pay more than his share of the  
5 expenses of maintaining and caring for the COMMON AREA and is entitled to and seeks in this  
6 cause of action to recover a pro-rata share of his overpayment from the other cotenants  
7 FREDERICKS, CIPRIANO, BAILEY, HOLLAND, ROBBINS, IVORY and VERDUN  
8 (hereinafter NONCONTRIBUTING COTENANTS) who have been unjustly enriched by GARY  
9 SMOLKER's overpayment. Additionally the court is requested to impress and foreclose a lien  
10 against the interests of the NONCONTRIBUTING COTENANTS in the COMMON AREA for  
11 their individual ratable share of the amount of overpayment by GARY SMOLKER to provide  
12 contribution to GARY SMOLKER for reimbursement of each cotenants' ratable share of the  
13 overpayment made by GARY SMOLKER in protecting the COMMON AREA. GARY  
14 SMOLKER and ALICE SMOLKER have made advances which are, and were at the time made,  
15 necessary to preserve the COMMON AREA. GARY SMOLKER and ALICE SMOLKER have  
16 had to spend their time and the time of Law Offices of Smolker & Graham, to preserve and  
17 protect the COMMON AREA from waste, from continuing to be maintained in a dangerous  
18 condition because NONCONTRIBUTING COTENANTS and PACIFIC VILLAS wilfully  
19 maintained and operated the common areas in a dangerous condition. Such action, on the parts of  
20 the SMOLKERS was, and is, necessary because NONCONTRIBUTING COTENANTS and  
21 PACIFIC VILLAS, and each of them, conducted themselves in a manner reasonably calculated to  
22 cause physical injury to third parties in conscious disregard of the health and safety of third  
23 parties. The SMOLKERS, and each of them, have been aggrieved by the dangerous manner in  
24 which NONCONTRIBUTING COTENANTS and PACIFIC VILLAS, and each of them,  
25 maintain and operate the common areas, and by waste committed on the common areas by  
26 NONCONTRIBUTING COTENANTS and PACIFIC VILLAS, and each of them. Cross-  
27 defendants, and each of them named in this cause of action, by their acts and omissions have  
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1 created and maintained a nuisance and dangerous condition in the common areas, have not taken  
2 reasonable steps to abate said nuisance or to remedy or mitigate such dangerous condition, or to  
3 mitigate reasonably foreseeable future damages that will be caused by said nuisance and  
4 dangerous condition if it is not abated, although each has been requested to abate such nuisance  
5 and to remedy such dangerous condition.

6 **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
7 hereinafter set forth.

8 **EIGHTEENTH CAUSE OF ACTION FOR NEGLIGENCE AGAINST**  
9 **COREGIS, CIC, CAINCO, TIE, TUA, FGI, AND FIG**

10 119. The SMOLKERS incorporate herein by reference as though fully set forth herein  
11 Paragraphs 2, 3, 4, 10, 18 through 24, 60 through 86, 92, 93, 111 and 112 of this cross-complaint  
12 with the same force and effect as though said paragraphs were set forth fully at this point

13 **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
14 hereinafter set forth.

15 **NINETEENTH CAUSE OF ACTION**  
16 **FOR NEGLIGENCE AGAINST TIG**

17 120. The SMOLKERS incorporate herein by reference as though fully set forth herein  
18 Paragraphs 2 through 4, 10, 16 through 24, 60 through 79, 80, 82, 90 through 93, 104, 106, 109,  
19 110, and 112 of this cross-complaint with the same force and effect as though said paragraphs  
20 were set forth fully at this point

21 **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
22 hereinafter set forth.

23 **TWENTIETH CAUSE OF ACTION**  
24 **FOR NEGLIGENCE AGAINST RELIANCE**

25 121. The SMOLKERS incorporate herein by reference as though fully set forth herein  
26 Paragraphs 2 through 4, 10, 16 through 24, 60 through 79, 80, 82, 87, 104, 106, 109, 110, and  
27  
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1 112 of this cross-complaint with the same force and effect as though said paragraphs were set  
2 forth fully at this point.

3 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
4 hereinafter set forth.

5 **TWENTY-FIRST CAUSE OF ACTION FOR NEGLIGENCE**  
6 **AGAINST FRONTIER**

7 122. The SMOLKERS incorporate herein by reference as though fully set forth herein  
8 Paragraphs 2 through 4, 10, 16 through 24, 60 through 79, 80, 82, 88, 89, 104, 106, 109, 110,  
9 and 112 of this cross-complaint with the same force and effect as though said paragraphs were set  
10 forth fully at this point.

11 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
12 hereinafter set forth.

13 **TWENTY-SECOND CAUSE OF ACTION FOR**  
14 **BREACH OF CONTRACT AGAINST CAINCO**

15 123. The SMOLKERS incorporate herein by reference as though fully set forth herein  
16 Paragraph 119 of this cross-complaint with the same force and effect as though said paragraph  
17 was set forth fully at this point.

18 124. Prior to October 1996, HOME SAVING purchased medical payments coverage for  
19 the benefit of others to pay medical expenses caused by an accident because of HOME  
20 SAVING's operations. These payments are to be made regardless of fault. HOME SAVING  
21 purchased this coverage for the benefit of others from CAINCO.

22 125. At the end of 1995, CAINCO renewed a written commercial general liability  
23 insurance policy issued to HOME SAVING, CAINCO Policy No. PC 913-2999 (CAINCO  
24 POLICY), containing a medical payments to others provision, denoted Coverage C Medical  
25 Payments, to HOME SAVING, providing the coverage described above in paragraph 124 for the  
26 benefit of Gary Smolker and Alice Smolker. Gary Smolker and Alice Smolker are intended  
27 beneficiaries of the CAINCO POLICY. The medical payment provisions of the CAINCO  
28

1 POLICY (Coverage C) create a direct obligation of CAINCO to Gary Smolker and Alice  
2 Smolker to pay reasonable medical expenses incurred for necessary medical, surgical, x-ray and  
3 dental services for expenses incurred and services rendered within year from the date of an  
4 occurrence causing bodily injury to which this policy applies, regardless of HOME SAVING's  
5 negligence or liability and without regard to the fault of Gary Smolker or Alice Smolker.

6 126. While the CAINCO POLICY was in effect, Gary Smolker and Alice Smolker  
7 incurred medical, x-ray, surgical, dental and hospital expenses for bodily injuries, sustained as a  
8 result of HOME SAVING's, covered by the CAINCO POLICY and made a timely claim for  
9 medical benefits owing to Gary Smolker and Alice Smolker under the CAINCO POLICY to  
10 CAINCO. Gary Smolker's bodily injuries and Alice Smolker's bodily injuries were caused by the  
11 activities of HOME SAVING.

12 127. In breach of the CAINCO POLICY, CAINCO denied the existence of the Medical  
13 Pay provision of the CAINCO POLICY, CAINCO refused to send the SMOLKERS a copy of the  
14 CAINCO policy, and CAINCO refused to pay medical benefits owing to the SMOLKERS.

15 128. As a direct and proximate result of CAINCO's breach of contract the SMOLKERS  
16 were not promptly paid insurance benefits owing; the SMOLKERS had to sue CAINCO in order  
17 to obtain benefits owing; and, the SMOLKERS have been damaged in a sum to be proved at trial  
18 in the amount of medical expenses already incurred and in the additional amount of future medical  
19 treatments ascertained or unascertained which will be necessary to treat the bodily injury suffered  
20 by Gary Smolker, Alice Smolker, Leah Smolker and Judi Smolker, which have not yet been paid  
21 by CAINCO. CAINCO has been unjustly enriched by the amount of medical expenses CAINCO  
22 should have promptly paid and did not pay promptly, and CAINCO will be unjustly enriched in  
23 the future by an additional sum equal to the amount of future medical expenses to be incurred by  
24 the SMOLKERS that CAINCO should pay but refuses to pay. The amount of unjust enrichment  
25 will be proved at time of trial.

1           129. The SMOLKERS have suffered emotional damages, and loss of earnings and  
2 earning capacity as a direct and proximate and foreseeable result of CAINCO's breach of contract  
3 in an amount to be proved at time of trial.

4           **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
5 hereinafter set forth.

6                               **TWENTY-THIRD CAUSE OF ACTION FOR BREACH**  
7                               **OF DUTY OF GOOD FAITH AND FAIR DEALING AGAINST CAINCO**

8           130. The SMOLKERS incorporate herein by reference as though fully set forth herein  
9 Paragraphs 123 through 129 of this cross-complaint with the same force and effect as though said  
10 paragraphs were set forth fully at this point.

11           131. Implied in the CAINCO POLICY are covenants by CAINCO that CAINCO would  
12 act in good faith and deal fairly, only engage in fair practices in dealing with the SMOLKERS and  
13 would treat the SMOLKERS with decency and humanity and not abuse its discretionary power  
14 and authority when processing the SMOLKERS' claim for medical benefits, and would do  
15 nothing to interfere with the SMOLKERS' rights to receive medical payment benefits under the  
16 CAINCO POLICY.

17           132. At all times since receipt of notice of the contamination problem in the SMOLKERS  
18 home, CAINCO has known the SMOLKERS were entitled to medical payments under the  
19 CAINCO policy and that CAINCO had a duty to disclose benefits owing under the CAINCO  
20 POLICY to the SMOLKERS. But, CAINCO refused to disclose benefits owing to the  
21 SMOLKERS. CAINCO refused to give the SMOLKERS a copy of the CAINCO POLICY.  
22 Upon receipt of the SMOLKERS' claim for payment of medical expenses, CAINCO knew that  
23 the SMOLKERS were entitled to payment of medical expenses and wrongfully, deliberately and  
24 without just cause refused to pay any of the SMOLKERS' medical expenses, and forced the  
25 SMOLKERS to sue CAINCO in order to obtain medical payment benefits owing to the  
26 SMOLKERS, in breach of CAINCO's covenant of good faith. In further breach of CAINCO's  
27 covenant of good faith, CAINCO has informed the SMOLKERS that the CAINCO would  
28

1 promptly investigate the problem in the SMOLKERS' home and take care of it, and demanded  
2 that the SMOLKERS not alter the condition of the SMOLKERS' home until CAINCO was done  
3 inspecting and testing the SMOLKERS' home, when CAINCO had no intention to promptly  
4 investigate the contamination problem in the SMOLKERS' home. Although repeatedly invited to  
5 do so, CAINCO never inspected or tested the SMOLKERS' home. CAINCO forced the  
6 SMOLKERS to bring and prosecute a lawsuit to receive any payment for medical expenses from  
7 CAINCO.

8 133. As a direct and proximate result of CAINCO's bad faith conduct, and breach of  
9 fiduciary duties, the SMOLKERS have suffered compensable losses, including benefits withheld,  
10 physical injury, property damage, additional medical expenses, loss of strength, loss of earning  
11 capacity and earnings, embarrassment and humiliation, anxiety and frustration, and severe mental  
12 and emotional distress and discomfort, all to the SMOLKERS damage in amounts not fully  
13 ascertainable but within the jurisdiction of this court in an amount to be proved at the time of trial.

14 134. Cross-defendant CAINCO's conduct described herein was done willfully with a  
15 conscious disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to,  
16 injure and annoy the SMOLKERS, such as to constitute oppression, fraud and malice under  
17 California Civil Code Section 3294 entitling the SMOLKERS, and each of them, to punitive  
18 damages in an amount appropriate to punish and set an example of cross-defendant CAINCO by  
19 means of punishment.

20 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
21 hereinafter set forth.

22 **TWENTY-FOURTH CAUSE OF ACTION**  
23 **FOR BREACH OF CONTRACT AGAINST TIE**

24 135. The SMOLKERS incorporate herein by reference as though fully set forth herein  
25 Paragraph 119 of this cross-complaint with the same force and effect as though said paragraph  
26 was set forth fully at this point.

1           136. Prior to October 1996, PACIFIC VILLAS purchased medical payments coverage  
2 for the benefit of others to pay medical expenses caused by an accident because of PACIFIC  
3 VILLAS' operations. These payments are to be made regardless of fault. PACIFIC VILLAS  
4 purchased this coverage for the benefit of others from TIE. The above described medical  
5 payment coverage is part of a written commercial policy containing commercial property  
6 coverage and liability coverage issued to PACIFIC VILLAS by TIE, TIE Policy Number 09387-  
7 08-30 ("TIE POLICY"), in 1986, which has been renewed annually ever since. The TIE POLICY  
8 was in force at all times material to this action.

9           137. The medical payments provision of the TIE POLICY issued to PACIFIC VILLAS is  
10 denoted Coverage C Medical Payments, and provides the coverage described above in paragraph  
11 136 for the benefit of Gary Smolker and Alice Smolker. Gary Smolker and Alice Smolker are  
12 intended beneficiaries of the TIE POLICY. The medical payment provisions of the TIE POLICY  
13 (Coverage C) create a direct obligation of TIE to Gary Smolker and Alice Smolker to pay  
14 reasonable medical expenses incurred for necessary medical, surgical, x-ray and dental services for  
15 expenses incurred and services rendered within year from the date of an occurrence causing bodily  
16 injury to which this policy applies, regardless of PACIFIC VILLAS' negligence or liability and  
17 without regard to the fault of Gary Smolker or Alice Smolker. The TIE also has property damage  
18 coverage which provides for repair of damage to the common areas of the CONDOMINIUM  
19 COMPLEX, and also has liability coverage for defense of liability lawsuits brought against Alice  
20 Smolker with respect to operations of the CONDOMINIUM COMPLEX.

21           138. While the TIE POLICY was in effect, Gary Smolker and Alice Smolker incurred  
22 medical, x-ray, surgical, dental and hospital expenses for bodily injuries, sustained as a result of  
23 PACIFIC VILLAS' operations, covered by the TIE POLICY and made a timely claim for medical  
24 benefits owing to Gary Smolker and Alice Smolker under the TIE POLICY to TIE. Gary  
25 Smolker's bodily injuries and Alice Smolker's bodily injuries were caused by the activities of  
26 PACIFIC VILLAS. While the TIE POLICY was in effect the common areas of the  
27 CONDOMINIUM COMPLEX suffered injuries and damages due to wind forces, explosion,  
28

1 falling objects, earthquake forces, malicious mischief, and vandalism covered by the TIE POLICY,  
2 and Alice Graham was sued by Carol Kay with respect to operations of the CONDOMINIUM  
3 CMOPLEX. The SMOLKERS made a timely claim for property damage covered by the TIE  
4 POLICY and tendered defense of the liability lawsuit to TIE.

5 139. In breach of the TIE POLICY, TIE denied the existence of the Medical Pay  
6 provision of the TIE POLICY, TIE denied the existence of the property damage provision of the  
7 TIE POLICY and TIE denied the existence of liability coverage under the TIE POLICY, and TIE  
8 refused to pay medical benefits owing to the SMOLKERS, refused to pay for repair of property  
9 damage and refused to defend Alice Smolker in the suit brought by Carol Kay..

10 140. As a direct and proximate result of TIE's breach of contract the SMOLKERS were  
11 not promptly paid insurance benefits owing; the SMOLKERS had to live with the property  
12 damage and contamination of the common areas that TIE should have paid to have cleaned up,  
13 the SMOLKERS had to provide their own defense to the action brought by Carol Kay against  
14 Alice Graham, and the SMOLKERS had to sue TIE in order to obtain benefits owing. The  
15 SMOLKERS have been damaged in a sum to be proved at trial in the amount of medical expenses  
16 already incurred and in the additional amount of future medical treatments ascertained or  
17 unascertained which will be necessary to treat the bodily injury suffered by Gary Smolker, Alice  
18 Smolker, Leah Smolker and Judi Smolker, which have not yet been paid by TIE. TIE has been  
19 unjustly enriched by the amount of medical expenses TIE should have promptly paid and did not  
20 pay promptly, the amount TIE should have paid to repair damage to the common areas, and TIE  
21 will be unjustly enriched in the future by an additional sum equal to the amount of future medical  
22 expenses to be incurred by the SMOLKERS that TIE should pay but refuses to pay. The amount  
23 of unjust enrichment, defense costs, and cost to repair or replace damaged property will be proved  
24 at time of trial.

25 141. The SMOLKERS have suffered emotional damages, injury to their health, loss of  
26 earnings and loss of earning capacity as a direct and proximate and foreseeable result of TIE's  
27 breach of contract in an amount to be proved at time of trial.

1           WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
2 hereinafter set forth.

3                   **TWENTY-FIFTH CAUSE OF ACTION FOR BREACH**  
4                   **OF DUTY OF GOOD FAITH AND FAIR DEALING AGAINST TIE**

5           142. The SMOLKERS incorporate herein by reference as though fully set forth herein  
6 Paragraphs 135 through 141 of this cross-complaint with the same force and effect as though said  
7 paragraphs were set forth fully at this point.

8           143. Implied in the TIE POLICY are covenants by TIE that TIE would act in good faith  
9 and deal fairly, only engage in fair practices in dealing with the SMOLKERS and would treat the  
10 SMOLKERS with decency and humanity and not abuse its discretionary power and authority  
11 when processing the SMOLKERS' claim for medical benefits, property damage and provision of  
12 a defense to a liability lawsuit, atnd would do nothing to interfere with the SMOLKERS' rights to  
13 receive medical payment benefits, or any other benefits under the TIE POLICY.

14           144. At all times since receipt of notice of the contamination problem in the SMOLKERS  
15 home, TIE has known the SMOLKERS were entitled to medical payments under the TIE  
16 POLICY and that TIE had a duty to disclose benefits owing under the TIE POLICY to the  
17 SMOLKERS. But, TIE refused to disclose benefits owing to the SMOLKERS, and without  
18 reasonable cause denied the SMOLKERS' claims. Upon receipt of the SMOLKERS' claim for  
19 payment of medical expenses, for property damage and tender of defense TIE knew that the  
20 SMOLKERS were entitled to payment of medical expenses, a defense of the Carol Kay lawsuit,  
21 and repair and clean up of the pesticide contamination in the common areas and repair of equake  
22 damage and wind damage and explosiion damage and falling objects damage, and wrongfully,  
23 deliberately and without just cause refused to pay any of the SMOLKERS' medical expenses, and  
24 refused to offer a defense to the Carol Kay lawsuit, and refused to repair any property damage  
25 and forced the SMOLKERS to sue TIE in order to obtain medical payment benefits owing to the  
26 SMOLKERS, defendse owing to Alice Graham and repair of property damage, in breach of TIE's  
27 covenant of good faith. In further breach of TIE's covenant of good faith, TIE has informed the  
28

1 SMOLKERS that the TIE would promptly take care of the problem in the SMOLKERS' home  
 2 and take care of it, and demanded that the SMOLKERS not alter the condition of the  
 3 SMOLKERS' home until TIE was done inspecting and testing the SMOLKERS' home, when  
 4 TIE had no intention to promptly investigate the contamination problem in the SMOLKERS'  
 5 home or to take care of it. Although repeatedly invited to do so, TIE never inspected or tested  
 6 the SMOLKERS' home. TIE forced the SMOLKERS to bring and prosecute a lawsuit to receive  
 7 any payment for medical expenses, etc. from TIE.

8 145. As a direct and proximate result of TIE's bad faith conduct, and breach of fiduciary  
 9 duties, the SMOLKERS have suffered compensable losses, including benefits withheld, physical  
 10 injury, property damage, additional medical expenses, loss of strength, loss of earning capacity  
 11 and earnings, embarrassment and humiliation, anxiety and frustration, and severe mental and  
 12 emotional distress and discomfort, all to the SMOLKERS damage in amounts not fully  
 13 ascertainable but within the jurisdiction of this court in an amount to be proved at the time of trial.

14 146. Cross-defendant TIE's conduct described herein was done willfully with a conscious  
 15 disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to, injure and  
 16 annoy the SMOLKERS, such as to constitute oppression, fraud and malice under California Civil  
 17 Code Section 3294 entitling the SMOLKERS, and each of them, to punitive damages in an  
 18 amount appropriate to punish and set an example of cross-defendant TIE by means of  
 19 punishment.

20 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
 21 hereinafter set forth.

22 **TWENTY-SIXTH CAUSE OF ACTION**  
 23 **FOR BREACH OF CONTRACT AGAINST TIG**

24 147. The SMOLKERS incorporate herin by reference as through fully set forth herein  
 25 Paragraph 120 of this cross-complaint with the same force as if fully set forth at this point.

26 148. While the TIG policies described above were in effect, Gary Smolker and Alice  
 27 Smolker incurred medical, x-ray, surgical, dental and hospital expenses for bodily injuries,  
 28



1 sustained while in their insured automobiles as a result of an accident, and property damage to  
2 their automobiles, covered by the TIG auto policy and made a timely claim for medical benefits  
3 owing to Gary Smolker and Alice Smolker under the TIG auto policy to TIG, and for property  
4 damage to their automobile, and damage to their personal property covered by their homeowners  
5 policy and tendered defense of the Carol Kay lawsuit to TIG.

6 149. In breach of the TIG policies, TIG denied the existence of the Medical Pay provision  
7 of the TIG auto policy and the property damage coverage of the homeowner policy, the  
8 earthquake damage coverage of the earthquake policy and the liability coverage under the  
9 homeowner and umbrella policies issued to the SMOLKERS by TIG. TIG refused to pay  
10 medical benefits owing to the SMOLKERS.

11 150. As a direct and proximate result of TIG's breach of contract the SMOLKERS were  
12 not promptly paid insurance benefits owing; the SMOLKERS had to sue TIG in order to obtain  
13 benefits owing; and, the SMOLKERS have been damaged in a sum to be proved at trial in the  
14 amount of medical expenses already incurred and in the additional amount of future medical  
15 treatments ascertained or unascertained which will be necessary to treat the bodily injury suffered  
16 by Gary Smolker, Alice Smolker, Leah Smolker and Judi Smolker, which have not yet been paid  
17 by TIG, and the SMOLKERS suffered physical injury to their bodies and property. TIG has been  
18 unjustly enriched by the amount of medical expenses TIG should have promptly paid and did not  
19 pay promptly, the amount TIG should have paid for the SMOLKERS to move out and live  
20 somewhere else, the amount TIG should have paid to replace or repair the damaged property  
21 insured under the TIG policies and structural engineering fees and defense costs for defending  
22 the lawsuit brought by Carol Kay against Alice Graham. TIG will be unjustly enriched in the future  
23 by an additional sum equal to the amount of future medical expenses to be incurred by the  
24 SMOLKERS that TIG should pay but refuses to pay. The amount of unjust enrichment will be  
25 proved at time of trial.

1           151. The SMOLKERS have suffered bodily injuries, loss of strength, emotional damages,  
2 and loss of earnings and earning capacity as a direct and proximate and foreseeable result of  
3 TIG's breach of contract in an amount to be proved at time of trial.

4           **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
5 hereinafter set forth.

6                           **TWENTY-SEVENTH CAUSE OF ACTION FOR BREACH**  
7                           **OF DUTY OF GOOD FAITH AND FAIR DEALING AGAINST CAINCO**

8           152. The SMOLKERS incorporate herein by reference as though fully set forth herein  
9 Paragraphs 147 through 151 of this cross-complaint with the same force and effect as though said  
10 paragraphs were set forth fully at this point.

11           153. Implied in the TIG policies are covenants by TIG that TIG would act in good faith  
12 and deal fairly, only engage in fair practices in dealing with the SMOLKERS and would treat the  
13 SMOLKERS with decency and humanity and not abuse its discretionary power and authority  
14 when processing the SMOLKERS' claim for medical benefits, property damage, and relocation  
15 expenses, and would do nothing to interfere with the SMOLKERS' rights to benefits under the  
16 TIG policies..

17           154. At all times since receipt of notice of the contamination problem in the SMOLKERS  
18 home, TIG has known the SMOLKERS were entitled to medical payments, relocation costs,  
19 replacement of contaminated furnishings and defense of the Carol Kay lawsuit under the TIG  
20 policies issued to the SMOLKERS and that TIG had a duty to disclose benefits owing under the  
21 TIG policies to the SMOLKERS and to promptly and prudently investigate the SMOLKERS'  
22 claims. But, TIG refused to and refused to acknowledge benefits owing to the SMOLKERS..  
23 Upon receipt of the SMOLKERS' claim for payment of medical expenses, TIG knew that the  
24 SMOLKERS were entitled to payment of medical expenses and wrongfully, deliberately and  
25 without just cause refused to pay any of the SMOLKERS' medical expenses, and refused to pay  
26 for replacement of the SMOLKERS contaminated property and relocation living expenses nad  
27 structural engineering expenses and forced the SMOLKERS to sue TIG in order to obtain  
28

1 medical payment and other benefits owing to the SMOLKERS, in breach of TIG's covenant of  
 2 good faith. In further breach of TIG's covenant of good faith, TIG had informed the  
 3 SMOLKERS that the TIG would promptly investigate the problem in the SMOLKERS' home  
 4 and take care of it, but instead unreasonably delayed investigating the SMOLKERS' claim, sent  
 5 out people who were not qualified to investigate the SMOLKERS' claim and denied the  
 6 SMOLKERS' claim. and prosecute a lawsuit to receive any payment for benefits owing to the  
 7 SMOLKERS from TIG.

8 155. As a direct and proximate result of TIG's bad faith conduct, and breach of fiduciary  
 9 duties, the SMOLKERS have suffered compensable losses, including benefits withheld, physical  
 10 injury, property damage, additional medical expenses, loss of strength, loss of earning capacity  
 11 and earnings, embarrassment and humiliation, anxiety and frustration, and severe mental and  
 12 emotional distress and discomfort, all to the SMOLKERS damage in amounts not fully  
 13 ascertainable but within the jurisdiction of this court in an amount to be proved at the time of trial.

14 156. Cross-defendant TIG's conduct described herein was done willfully with a conscious  
 15 disregard of the SMOLKERS' rights and with intent to vex, cause unjust hardship to, injure and  
 16 annoy the SMOLKERS, such as to constitute oppression, fraud and malice under California Civil  
 17 Code Section 3294 entitling the SMOLKERS, and each of them, to punitive damages in an  
 18 amount appropriate to punish and set an example of cross-defendant TIG by means of  
 19 punishment.

20 WHEREFORE, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
 21 hereinafter set forth.

## 22 TWENTY-EIGHT CAUSE OF ACTION

### 23 FOR BREACH OF CONTRACT AGAINST FRONTIER

24 157. FRONTIER knows what the contract is, what its breach is and what damages are  
 25 being claimed by the SMOLKERS. The court's page limit does not allow setting forth allegations  
 26 concerning this cause of action. The court's time limit did not allow enough time to plead this  
 27 cause of action in any further detail or to edit this fifth amended cross-complaint.

1       **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
2 hereinafter set forth.

3                   **TWENTY-NINETH CAUSE OF ACTION**  
4                   **FOR BREACH OF CONTRACT AGAINST RELIANCE**

5       158. RELIANCE knows what the contract is, what its breach is and what damages are  
6 being claimed by the SMOLKERS. The court's page limit does not allow setting forth allegations  
7 concerning this cause of action. The court's time limit did not allow enough time to plead this  
8 cause of action in any further detail or to edit this fifth amended cross-complaint.

9       **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
10 hereinafter set forth.

11                   **THIRTIETH CAUSE OF ACTION**  
12                   **FOR FRAUD AGAINST MORRIS, HOME SAVING, GRACE, GRACE DAVISON,**  
13                   **TIE, FIG, COREGIS, CAINCO, CIC, TIG**

14       159. The cross-defendants named in this cause of action know what the fraud is, what its  
15 and what damages are being claimed by the SMOLKERS. The court's page limit does not allow  
16 setting forth allegations concerning this cause of action. The court's time limit did not allow  
17 enough time to plead this cause of action in any further detail or to edit this fifth amended cross-  
18 complaint.

19       **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
20 hereinafter set forth.

21                   **THIRTY FIRST CAUSE OF ACTION**  
22                   **FOR INTERFERENCE AGAINST MORRIS, HOME SAVING, CAINCO, COREGIS,**  
23                   **CIC, TIE, FIG, GRACE AND GRACE DAVISON**

24       160. The cross-defendants named in this cause of action know what the interference is, and  
25 what damages are being claimed by the SMOLKERS. The court's page limit does not allow  
26 setting forth allegations concerning this cause of action. The court's time limit did not allow  
27  
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1 enough time to plead this cause of action in any further detail or to edit this fifth amended cross-  
2 complaint.

3 **WHEREFORE**, cross-complainants Gary Smolker and Alice Smolker pray judgment as  
4 hereinafter set forth.

5  
6  
7 ON ALL CAUSES OF ACTION

8 1. For general damages and special damages according to proof in an amount in excess of  
9 the minimum jurisdiction of the above entitled court.

10 2. For damages for past and future medical and dental related expenses according to  
11 proof at time of trial.

12 3. For damages to personal property and to real property, and for loss of use of property  
13 according to proof at time of trial.

14 4. For exemplary damages and punitive damages in an amount the court deems just and  
15 reasonable.

16 5. Prejudgment interest as allowed by law.

17 6. Costs of suit herein.

18 7. Such other and further relief which the court deems just and proper.

19 8. For an order directing the owners of each condominium in the CONDOMINIUM  
20 COMPLEX to pay a pro-rata contribute share of the costs incurred by cross-complainants and a  
21 prorata contributive share of the reasonable value of cross-complainants services in prosecuting  
22 actions seeking order directing the manner and method to be followed to abate the nuisance(s)  
23 and dangerous conditions existing at the CONDOMINIUM COMPLEX, to stop waste from  
24 continuing at the CONDOMINIUM COMPLEX, and for recovery of costs necessary for repair or  
25 replacement of contaminated property from HOME SAVING, GRACE, GRACE DAVISON,  
26 TIE, MORRIS, and HOME SAVING, and that a lien be impressed on each owner's interest in the  
27 common areas to secure the payment of each owner's share and that such lien be foreclosed by  
28

1 the court.

2 9. For an order directing each owner, GRACE, GRACE DAVISON, HOME SAVING,  
3 MORRIS, and TIE to do whatever the court deems necessary to abate the nuisance and illegal  
4 condition of having an unregistered poison, termite infestations and termite damages in the  
5 common areas..

6 Dated: August 12, 1999.

7 Law Offices of Smolker & Graham

8 

9  
10 Gary S. Smolker

11 Attorneys for Cross-complainants Gary and Alice Smolker  
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**DECLARATION OF SERVICE BY MAIL**

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4720 Lincoln Blvd., Suite 250, Marina del Rey, California 90292.

On August 12, 1999, I served the attached document described as follows:

**FIFTH AMENDED CROSS-COMPLAINT**

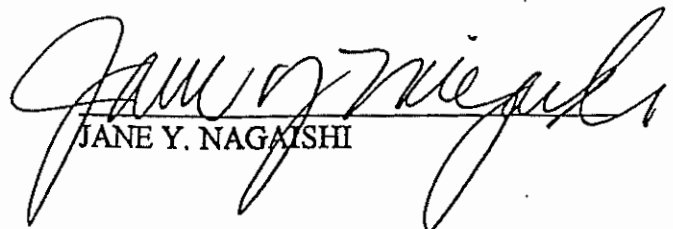
on the interested parties in this action by facsimile for the fax number(s) listed, and by causing a true copy thereof enclosed in a sealed envelope(s), addressed as follows to be placed in the U.S. Mail at Los Angeles, California:

See Attached Service List

I am "readily familiar" with the firm's practice of collection and processing of correspondence for mailing. Under that practice, correspondence placed in envelopes is deposited in the U.S. postal service on the same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I know the envelope was sealed and, with postage prepaid, placed for collection and mailing on this date, following ordinary business practice, in the United States Mail at Los Angeles, California. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 12, 1999 at Marina del Rey, California.

  
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**Exhibit J**